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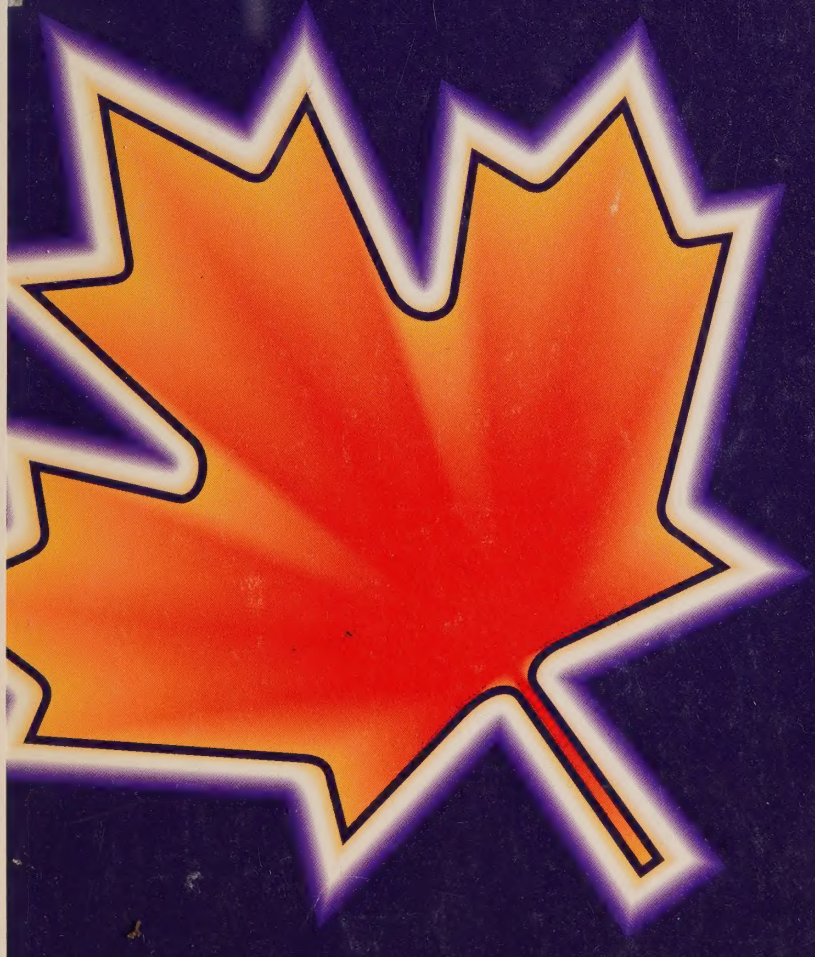

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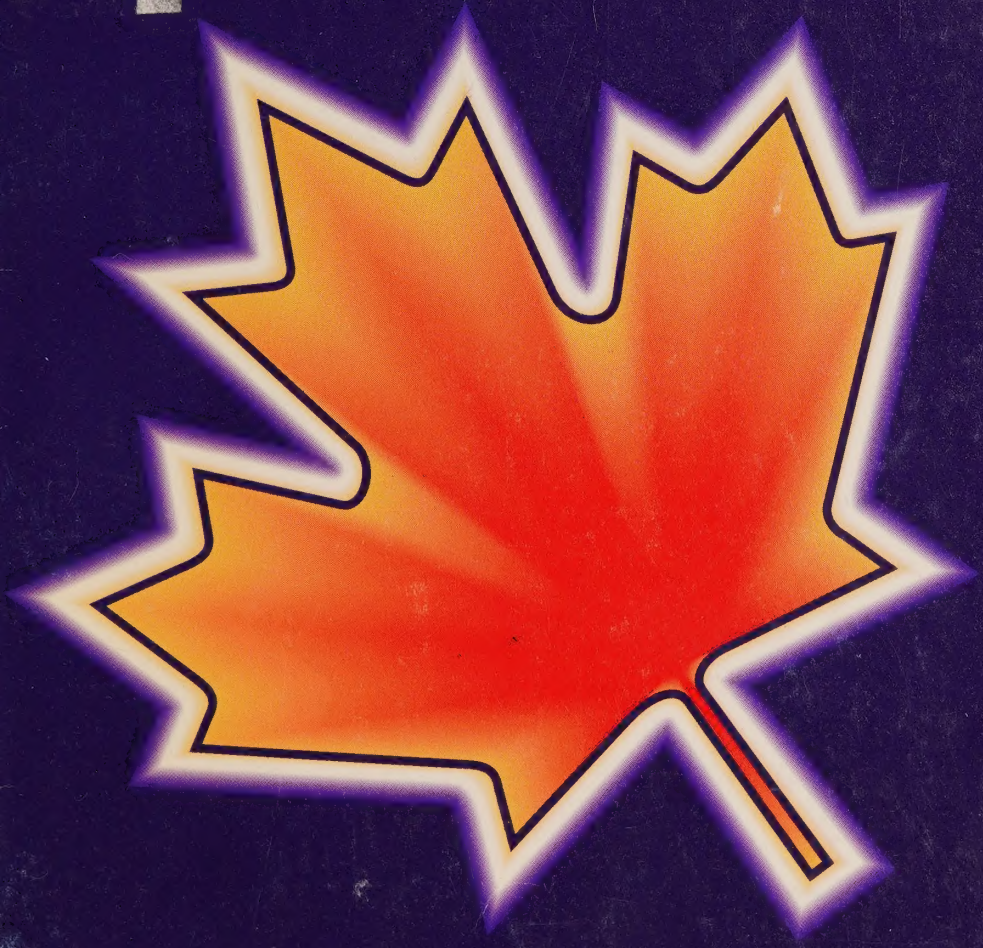

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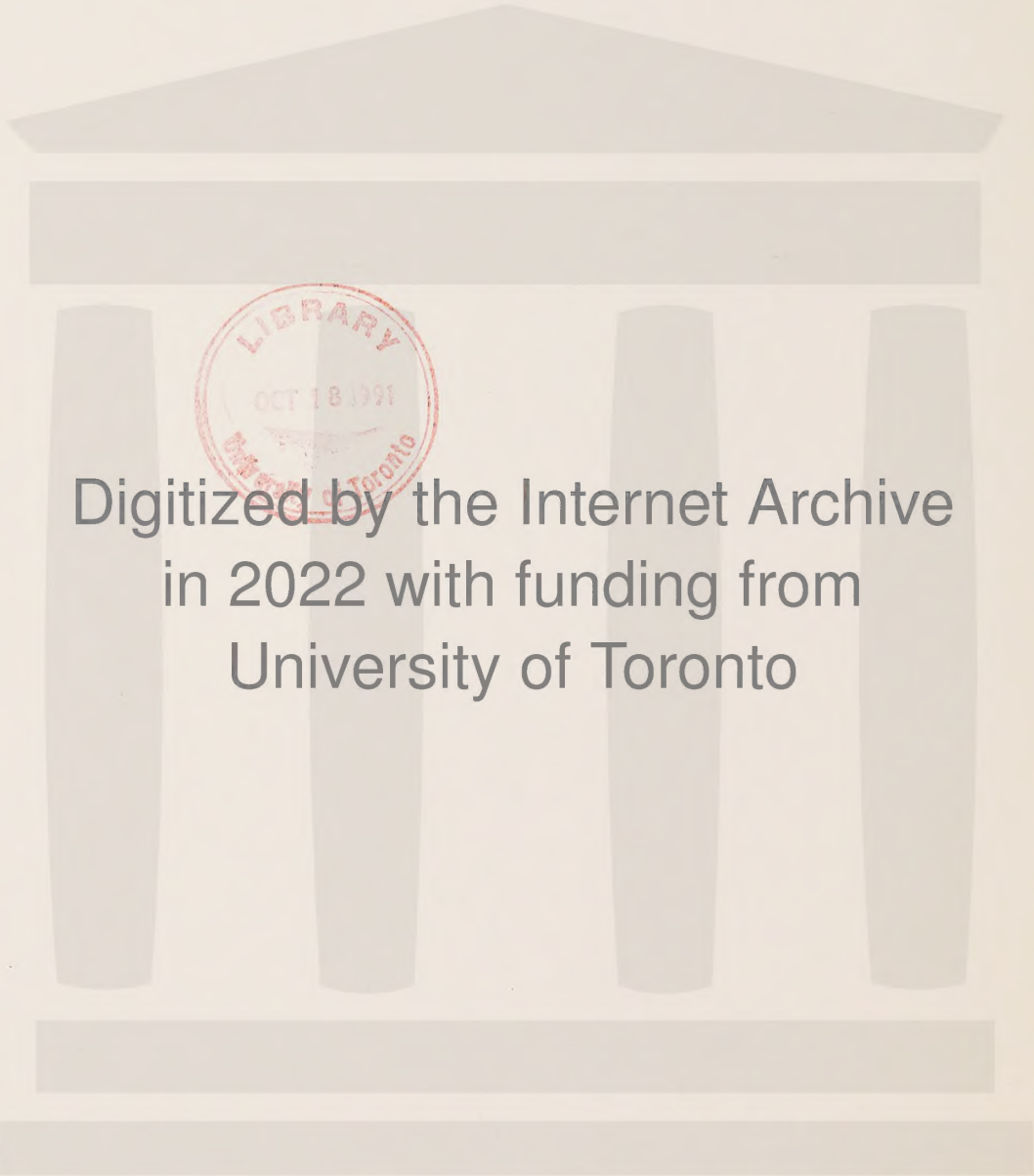
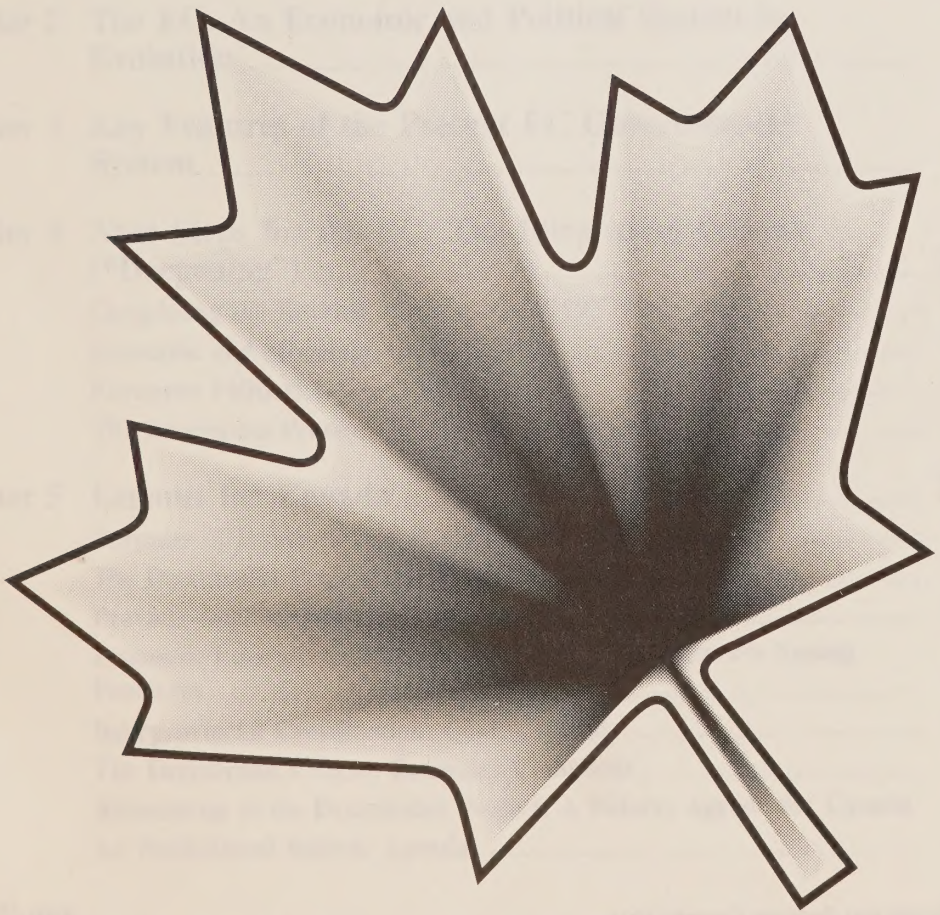


THE EUROPEAN COMMUNITY

A Political Model for Canada?

By Peter M. Leslie



Cat. No. CP22-35/1991E

ISBN 0-662-19179-X

Copies disponibles en français

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Foreword

This paper was commissioned by the Federal-Provincial Relations Office to provide detailed background information on the relevance of the European Community as a political model for Canada, because the European Community has so often been cited in discussions about appropriate arrangements for Canada's future. It is now included in the series of background papers accompanying the release of *Shaping Canada's Future Together: Proposals* in order that the public might have this analysis available.

Acknowledgements

This paper is based mainly on documentary sources and on information provided in the course of interviews with officials of the European Community in February 1991. The assistance of the individuals concerned, without whose help the paper could not have been written, is gratefully acknowledged.

Daniel Molgat, Canadian Ambassador to the European Communities, and his staff at the Mission of Canada to the European Communities, also rendered invaluable assistance, both through their own expertise and advice, and through the help they unstintingly provided in helping me gain access to European decision makers.

I am pleased also to acknowledge the help provided by Peter Ludlow, Jacques Pelkmans, Harry Post, and Bob Wolfe, in the course of some very stimulating discussions.

Any errors contained in this paper are my personal responsibility.

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September 3, 1991

Summary

The creation of a single market spanning most of western Europe has substantially reduced, in practice, the autonomy of the 12 member states of the European Community (EC). In some respects, the powers of the states are more limited than the powers of the provinces in Canada; for example, all forms of state assistance to industry (grants, loans, etc.) are prohibited unless approved by the European Commission, a body whose members are appointed by the states but — under the treaties establishing the Community — are not subject to their influence or control. If current efforts to intensify the integration process succeed, then the powers of the member states will be further limited: the states will lose much of their power of regulating national markets, much of their fiscal autonomy, and some of their power in areas that are not strictly or even mainly economic (environmental protection, employment conditions, immigration).

There is a clear lesson in EC experience for those Canadians who apparently believe the Community has demonstrated that states of diverse cultures can join together economically, while retaining their political sovereignty. This perception is based on a shallow or outdated perception of the EC. An examination of its recent history shows that there is a close relationship between the processes of economic and political integration: an integrated economy can *only* be built by creating a capacity for joint decision making. *In other words, economic integration cannot proceed far unless member states share quite a broad range of powers by allocating decision-making authority to supranational institutions in which they may be outvoted from time to time, or unless — as in a federal system — decision-making power in key economic areas is constitutionally vested in an order of government that encompasses the whole territory.*

This lesson is abundantly clear from the current process of "deepening" the Community, i.e., carrying the integration process several extra notches forward, through

- the "1992" program for creating a market without internal frontiers — which entails removing all barriers to the free movement of goods, services, labour, and capital (termed, apparently without conscious irony, "the four freedoms");
- the creation of Economic and Monetary Union, or EMU, involving a common currency by (perhaps) the late 1990s; a precondition appears to be that the states should coordinate their fiscal policies, agreeing not to incur "excessive" budgetary deficits; and

- the creation of European Political Union (EPU), which would extend the integration process into the political (defence and security) sphere, and further limit the autonomy of member states by mandating greater intergovernmental cooperation.

While each of these elements in the deepening process would further diminish the autonomy of the states, political institutions and processes within the Community would remain (as at present) essentially *confederal*. In other words, decisions will continue to be made by negotiation among member states, and the Community will remain largely dependent for its finances on contributions from the member states (at present, about 1 per cent of gross domestic product). While some Europeans wish to transform the EC into a federation — involving the creation of a new order of government with an independent political base and its own power to levy taxes — present plans are still pre-federal in nature. Implication: member states have surrendered control over policies covering a wide range of the functions of government, without creating a new order of government that is genuinely responsible to a Community-wide electorate (the powers of the European Parliament remain quite limited). Accountability and control of government by the people are poor, a phenomenon frequently described as the EC's "democratic deficit".

The EC member states have, then, created a set of governmental institutions at the Community level that: (i) are controlled by the states collectively, but exercise considerable power over them individually; (ii) are fiscally dependent upon the states, and lack capacity to redistribute the gains achieved by economic integration, except rather marginally — by Canadian standards — through the Common Agricultural Policy and "structural funds" which are mainly for regional development; and (iii) are not subjected to effective democratic control. If these characteristics of the EC were clearly understood in Canada, it is unlikely that the EC would be regarded, perhaps by anyone, as a "political model" superior to the form of federalism that Canada has developed.

Among those Canadians who are committed to reforming the federal system (as opposed to replacing it with confederalism), some propose transferring important policy responsibilities and powers from the federal government to the provinces. They have advanced a decentralist project, of which there are three variants.

- The first variant posits retention of an integrated market, essentially as an indirect result of the fact that all provinces would have to exercise their (formally augmented) economic powers in ways acceptable to the United States. The argument is that, in practice, the autonomy of small states is inevitably limited by the power of bigger ones; for example, the dominant position of the United States requires Canada to follow the US lead on stabilization policy, and to conform to US-set rules on trade. Hence it may be argued that if the provinces gained new powers under the constitution, the way they exercised those powers would nonetheless be subject to pervasive US influence or control. In practice they would probably lose, not gain, control over their economic, social, and cultural development — but the "Canadian" economy would be an integrated one. EC experience would not be relevant under this scenario.
- The second variant posits a reduced role for government, and the preservation of an integrated Canadian market as a result of "negative integration". This means that the

provinces or states would commit themselves to the free movement of goods, services, labour, and capital among themselves and to achieve this, their powers would be limited by mutual agreement. Essentially, they would commit themselves to avoid discriminating against each other; in other respects each would have a free hand in setting policy. However, EC experience has demonstrated the limitations of negative integration. The history of the EC after 1985 is the history of the creation of a much broader policy capacity at the Community level, or "positive integration". The EC was pushed in this direction by the threat of breakdown, which would have forfeited the gains of the period from 1958 to the mid-1980s. EC experience clearly indicates that positive integration is needed to prevent the fragmentation of markets.

- The third variant of a decentralist project for Canada posits policy coordination among the provinces or states, and the enfeeblement of the federal government. This is the only variant where the EC would be, in any significant way, a political model for Canada. However, its deficiencies are those already identified: the system would be regarded by Canadians as undemocratic; it would lack the capacity to redistribute the benefits of having an integrated market, and on that score would probably be politically unacceptable to many Canadians; and it would sharply reduce the capacity of the federal government to defend Canadian economic interests internationally, especially vis-à-vis the United States.

The first of two main conclusions to this study is the following: EC experience, insofar as it is relevant to Canada, clearly indicates that wholesale decentralization would render the governmental system ineffectual in meeting essential needs or goals of Canadians. This point has been touched on above.

The second main conclusion is that study of the EC institutions and governmental processes may assist in blocking out an institutional reform agenda for Canada. The EC operates on a completely different basis from the Canadian federal system. Where our system emphasizes separateness of governmental responsibilities (and the assumption is often made that the division of powers should be revised in order to achieve neater or fuller separation of functions), the EC operates on the basis of *co-responsibility*. Canada might try to emulate this principle, at least in some respects. This would involve

- provinces' acting to complement federal decisions in areas where joint action is needed to fulfil public purposes;
- co-decision making, under which provinces may be involved in taking certain decisions applying Canada-wide, especially in areas of divided or overlapping jurisdiction, on the understanding that they would adhere to and help implement the decisions made;
- building a Canada-wide consensus — whether under federal leadership, or interprovincially — on subjects that lie primarily or exclusively within provincial jurisdiction (the provinces would have to be committed to do their part in translating the Canadian consensus into public policy); and
- establishing "neutral" mechanisms and/or processes for seeing that provincial governments meet their obligations, as indicated above — thus relieving the federal government of this responsibility, and freeing the provinces from its control.

With reference to each of these goals the EC may be, at least in certain respects or to a certain degree, a very positive political model for Canada.

Chapter 1

Introduction

1. The EC as a "political model"

The European Community (EC) is sometimes held up as a political model that could be adapted to Canadian needs and conditions, for the purpose of restructuring or replacing the existing federal system. This paper comments on the idea of borrowing certain features of EC institutions and practices of government, and incorporating them into a re-made system of government for Canada.

2. Its attractions

Those who are attracted to "the European model" for Canada appear to regard the EC as proof that states of diverse cultures can join together economically, while retaining their national distinctiveness and their political sovereignty. For them, EC experience shows that it would be possible to preserve the Canadian economic union while dismantling, at least partly, the political one.

3. Apparent misconceptions about the EC

This paper argues the opposite: that European experience demonstrates the close relationship between economic and political integration, and is *not* an example of disjunction between economic and political union. Not only have political leaders in the EC given the go-ahead for proceeding with "European Political Union", but the form of political union now envisioned for the EC countries would be regarded by Canadians as undemocratic, would be ineffectual in certain key respects, and would in other ways be unsuited to Canadian conditions. On the other hand, the paper argues that there are some institutional elements, and some features of political custom or practice in the EC, that deserve close scrutiny by Canadians, with an eye to borrowing in adapted form.

4. Two areas of interest for Canadians

Recent developments in the EC raise two different types of questions for Canadians: (i) about altering the division of powers, or the fulfilment of policy responsibilities by the federal government and the provinces respectively, and (ii) about reshaping central institutions and reforming processes of governance (including the conduct of intergovernmental relations), where the relevant issues are those of democratic control, fairness in government, and the effectiveness and efficiency of government action.

5. *Pitfalls in comparing the division of powers; the importance of institutional differences*

The second issue, that of reforming the institutions and processes of government on the basis of lessons learned from the EC, has received far less attention from Canadians than division of powers issues. That is unfortunate, because the "who does what" approach easily gives rise to false comparisons. A Canadian who learns that in the EC the Community has competence in regard to (say) competition policy is likely to interpret this in light of the federal structure in Canada, where the constitution allocates powers to two orders of government that tend to act independently of each other, and frequently challenge and oppose each other. Not only is there imprecision in such comparisons, deriving from the complications of the double listing of powers in Canada, but there is a conceptual pitfall to be avoided: to say the Community "has competence" is very different from saying that the Canadian federal government "has jurisdiction". *The meaning is different because the institutions of government and the processes of governance are different.* It is this that Canadians are least likely to understand about the EC, and that correspondingly is given at least "equal time" in this paper.

6. *The approach taken in this paper*

If there are lessons Canadians might usefully learn from EC experience, those lessons will be discovered: first, by examining what the EC states have found it necessary to do together, or how they have been induced to transfer powers to the Community; and second, by analyzing the institutional structures the EC states have found it necessary or desirable to create — in other words, how the system works, *why* it works *there*, and whether parts of it appear to be transportable. In what follows, issues relating to Community "competences" or powers are mixed in with structural or institutional ones; where appropriate, those issues are set in the context of an evolving global economy, the collapse of command economies in Eastern Europe, and the existence of economic disparities among EC member states. (Readers who are broadly familiar with the EC and its recent evolution may be able to proceed directly to paragraph 41, using the intervening paragraphs, as required, on a reference basis.)

Chapter 2

The EC: An Economic and Political System in Evolution

7. The EC as three communities: ECSC, EEC, and Euratom

Officially, there is not one European Community but three: the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (Euratom). The Communities were created by treaties (ECSC, 1951; EEC, 1957; Euratom, 1957), each of which has been amended several times; their apparent irreversibility gives them the character of a constitution. Since 1967 the three Communities have shared a common set of governing institutions, and have had a common budget.

8. EC membership: the "widening" process

The EC is undergoing a process of "widening" through the addition of new members. Membership has grown from six states to 12, and the Community now comprises almost the whole of Europe outside the former Communist bloc, notable exceptions being Switzerland, Austria, Norway, Sweden, and Finland. Of these, Austria and Sweden have applied for membership, and Norway may do so soon. Turkey, Malta, and Cyprus too have applied. It is not anticipated that there will be early action on any of these applications, because priority is being given to a "deepening" process reflecting the dynamic of economic and political integration. However, Jacques Delors, President of the European Commission, has said that by the early years of the next century, the Community may comprise 20 or even 22 states — by implication, the whole of Eastern Europe.

9. "Deepening"

"Deepening", or the consolidation and extension of the integration process, is very much on the Community's current agenda.

9.1 The "1992" program: a market without internal frontiers; the SEA (1987)

- In 1987 an omnibus revision to the treaties known as the "Single European Act" (SEA) came into force. The SEA made important institutional changes and committed the Community to establishing a market "without internal frontiers" by 31 December 1992. The substance of the "1992" program is contained in a 1985 White Paper, *Completing the Internal Market*, by the European Commission. In this document, which laid the groundwork for the SEA, the Commission identified almost 300 separate steps it believed were required to remove all barriers to the free movement of goods, persons, services,

and capital. Decisions-in-principle have now been taken on about two thirds of these items, although some difficult ones remain, and (in addition) implementation inevitably lags behind.

9.2 Proposed treaty amendments: Economic and Monetary Union, European Political Union

- A new set of treaty amendments is now under negotiation and is targeted for ratification in 1993, with a view to achieving Economic and Monetary Union (EMU) and a form of European Political Union (EPU). These are linked projects to be launched on 1 January 1994. The revised treaty would set out the stages for progressing towards EMU and EPU. Completion dates remain to be established, but EMU (entailing the creation of a single central bank and a common currency) is thought by its proponents to be feasible by the late 1990s.

10. EMU/EPU would be accomplished without major institutional change

The EC is thus a system in evolution. This is a fact that complicates the task of assessing the attractions and disadvantages of "the European model" for Canada. What the EC is now, in 1991, is perhaps less important than what it may become, or what the member states intend it should become by the end of 1992, or (eventually) under EMU/EPU. Nonetheless, it is possible to compare the existing Canadian system with a European one that is in the process of being created. That is because the form of political union now being contemplated would leave the institutional structure of the Community very largely intact, although some of the decision-making rules would change and the scope of Community activities would be considerably expanded.

Chapter 3

Key Features of the Present EC Governmental System

11. The EC: an association of states, not a federation

The European Community is a close association of states that effectively constrain each other through supranational institutions which they have erected, and whose most important decisions they jointly direct. Notwithstanding the breadth of Community competences, and the intention to expand them further, the Community is not federal: there is no central government with its own electoral and fiscal base. It is probably a universally applicable rule, that a central political authority, even one possessing entrenched powers, cannot act independently of regional or state governments if it lacks independent electoral support and its own fiscal resources.

12. Canadian comparisons

The central or governing institutions of the Community are less powerful than the Canadian federal government in several respects.

12.1 The legislative process: the Council of Ministers and the European Parliament

- Community legislation is enacted by the Council, a 12-member group composed of ministers designated by the member states — for general business, normally the foreign minister, but other ministers (finance, agriculture, environment, etc.) may represent their governments according to the subject of a particular meeting. The European Parliament, which since 1979 has been directly elected, is a consultative and constraining body (partly by virtue of its power to reject a proposed budget), not a legislature. Although it votes on proposed legislation, a proposal it rejects or amends may still be passed by the Council, if unanimity can be obtained (abstentions permitted). *To imagine a Canadian analogy, it is as if an interprovincial council (made up of designated provincial ministers) enacted federal laws, while Parliament gave non-binding advice, or could require that the interprovincial council must act by unanimity.*

12.2 The executive power; role of the European Commission

- According to treaty provisions, the 17 members of the European Commission — which wields certain executive and treaty-implementing powers, participates in the legislative process, and exercises the power of initiative across a broad front — "shall be appointed by common accord of the Governments of the Member States," in each case for a fixed term of four years. In practice, each member state appoints (according to its size) either one or two Commissioners, whose duties (or, to use a Canadian analogy, portfolios) are assigned

by the President of the Commission. The treaty stipulates that Commissioners "shall . . . be completely independent in the performance of their duties; . . . they shall neither seek nor take instructions from any Government or any other body." As a practical matter, the Commission cannot be said to be politically responsible to the European Parliament or to any other body (but see also paragraph 36.1). *While some people have professed to see the Commission as a form of political executive or (as it were) a proto-Cabinet, this description ignores its non-elective, non-responsible character. To imagine a Canadian analogy, it is as if provincial Premiers named a secretariat which, by formal interprovincial agreement, was given a key role in collective decision making, including sole power of initiative in policy formulation and legislative proposal, as well as possessing key administrative powers and having a significant role in enforcing interprovincial agreements.*

12.3 Community dependence on member states: finances

- Community revenues are supplied by the member states on the basis of unanimous agreement. The last such agreement was reached in 1988, and runs until 1993. It sets a limit to Community revenue and expenditure that will reach, by 1992, a maximum of 1.2 per cent of the aggregate GNP of the member states. Revenues are provided by customs duties, agricultural levies (both of which accrue exclusively to the Community), and grants by member states equivalent to the yield that would accrue from a value-added tax (or VAT, analogous to the Canadian GST), set at 1.4 per cent of a standardized base. The Community share of the VAT equals about 0.7 per cent of each country's GNP). While these funds are officially described as part of the Community's "own-resources" revenue, the description is accurate only in the sense that member-states have committed themselves to provide it over five years. This is not a tax levied or collected by the Community; consequently, the Community is vulnerable to financial pressure from a recalcitrant member. (This was illustrated in 1988, when the United Kingdom successfully demanded a lower ceiling on agricultural price supports during the re-financing negotiations: on this occasion, the UK showed it was possible to force alterations in Community policy, as a condition of — in the language of Parliamentary government — "granting supply".) *To imagine a Canadian analogy, it is as if provincial governments financed the operations of the federal government, contributing between 2 and 4 per cent of their revenue for this purpose (the exact percentage varying by province).*

12.4 Community dependence on member states: administration

- The Community is, in many policy areas, administratively dependent on member states. Although complaints about "Brussels bureaucrats" are rife, and the Commission possesses powers of regulation, investigation and administrative decision in fields such as agriculture policy and competition policy, in most fields implementation depends on

the cooperation and conscientiousness of national administrations. The potentially serious consequences of this dependency are, however, limited by the existence of a European Court of Justice with power to "ensure that in the interpretation and application of this Treaty the law is observed". One should also note the apparent readiness of national courts to hold member states to their treaty obligations, as laid down by the Court of Justice, and to enforce Community regulations and decisions. *To imagine a Canadian analogy, it is as if the vast bulk of federal laws and regulations were not only enacted by representatives of the provinces (as noted in paragraph 12.1) but administered by provincial officials, while a provincially nominated supreme court ruled on whether or not the various provincial governments were respecting commitments they had made to each other.*

12.5 Community dependence on member states: national legislation and Community directives

- The Community's dependency on member states extends also to the legislative field. To achieve certain of the stated aims of the Community, for example removal of restrictions on the free movement of persons, services, and capital, the Council of Ministers is empowered to issue directives to member states: these are instructions to enact and administer legislation in ways that will meet certain requirements, objectives, or standards. In some cases the national courts have been ready to treat directives as immediately applicable (i.e., even in the absence of the prescribed follow-through by the member state concerned), but the opportunities for foot-dragging and imperfect conformity with directives are obvious. The European Court of Justice has no power to impose sanctions against a member state that does not fulfil obligations assigned to it by Council directives. *To imagine a Canadian analogy, it is as if an interprovincial ministerial council — acting sometimes by unanimity, and sometimes by agreement among six or eight provinces (depending on their size) — could pass framework legislation which had then to be adapted, fleshed out, and passed into law by provincial legislatures.*

13. Member states' abnegation of sovereignty:

The non-federal or pre-federal character of the EC's institutional structure is only half the story of how the EC works. The other half, equally significant, is that member states are accepting more and more limitations on their power of independent decision. Member states have indeed (as the jargon puts it) "pooled" their sovereignty. They may not have transferred sovereign powers to a new order of government, but they have given up sovereignty nonetheless.

13.1 paramountcy of Community law

- Community law overrides the law of member states.
  - The European Court of Justice, appointed by common accord of the states, takes binding decisions on the validity of national legislation and administrative acts, on the basis of the treaties and Community directives and regulations.

– The Court of Justice also has the power to issue injunctions to member states, requiring them to take action to fulfil their obligations under the treaty or to bring their law or administrative practice into conformity with Community directives.

– Proceedings may be launched by member states, although in practice they are seldom launched except by the Commission, which may be acting on its own initiative or may be following up a complaint by one of the states. Legal proceedings, however, are a last resort, and will be instituted only when other avenues of action have failed to resolve the problem. Before prosecuting, the Commission always formulates a reasoned opinion on the alleged infringement of the treaty or of Community law, and attempts a negotiated solution.

– Where Community law is invoked in proceedings before the national courts, the Court of Justice also may decide, through a "preliminary ruling", on the validity of national law, national administrative acts, or national treaties. The Court's rulings are "preliminary", not in the sense of "tentative" — indeed, they are final, and are binding on national courts — but in the sense of being sought and rendered *before the national court reaches a decision.* Preliminary rulings come into the picture if arguments are raised in the national courts regarding the application of treaty principles, or the consistency of national law with Community acts (directives, regulations, decisions). When such arguments are made, the national court is entitled to ask the Court of Justice for an interpretation; a national court of last instance (i.e., final appeal) is obliged to do so, if it considers that a decision on the validity of the impugned national law is necessary in order to give judgment. If so, the national court will suspend proceedings, and resume them only after the preliminary ruling from the Court of Justice has been obtained.

13.2 decisions by "qualified majority"

- Increasingly, the Council takes decisions by "qualified majority", under a system of weighted voting, rather than by unanimity. Decision making by qualified majority occurs as follows. States have multiple votes in the Council, somewhat in proportion to population (the range of votes is from 2 to 10). A qualified majority is 54 votes out of 76. The effect is that a qualified majority is achieved when a minimum number of states — between 7 and 10, depending on size — vote together. On some matters the support of 8 member states is required. No combination of only two states, no matter how large, constitutes a blocking coalition.

14. Community control of national governments:

Under the treaties, member states have committed themselves to a set of common market principles that are enforced through the action of supranational institutions (the Commission and the Court of Justice) — a

commitment which effectively transfers ultimate control over industrial policy and incentives for economic development to the Community. In addition, the states have conferred upon Community institutions the authority to implement extensive market controls over the specified sectors; they have conferred on the Council the power to require them to "approximate" (coordinate, harmonize) their laws over a broad range of economic and social policies; and they have bound themselves to the principle of mutual recognition of each others' regulations in various areas. In all respects they have surrendered autonomy, or *de facto* sovereignty.

14.1 common market rules — trade and industrial policy; economic and regional development

- Responsibility for external trade policy — tariffs and quantitative restrictions — gives Community institutions (Commission and Council) substantial discretionary control over the development of particular sectors by deciding to what extent they are to be exposed to non-European Community competition. In addition, all forms of internal trade barriers, including industrial subsidies ("state aids" to industry) are prohibited unless sanctioned by the Commission. Broadly speaking, the Commission approves those "state aids" that are aimed at restructuring enterprises to make them competitive within the EC and globally, but (supposedly at least) prohibits bailouts — in practice, national subsidies are often approved routinely, but the power to prohibit them is there, and used in some high-profile cases. The Commission also administers, in cooperation with member states, its own "structural funds" for regional development and for research and technological innovation. Inevitably, the discretion vested in the Commission gives it *de facto* power to restructure declining industries and to stimulate growth in areas and in sectors it judges to be promising. While it acts in cooperation with member states, the role of the latter in promoting economic development is subject to the Commission's supervision and control.

14.2 common policies — coal and steel, atomic energy, agriculture, fisheries, and transportation

- The Community powers reviewed above give the Commission and the Council broad control over market conditions and stimulative measures affecting particular sectors, regions, and firms; but they do not confer wholesale power to regulate, thus supplanting national regulations. Such power is, however, conferred upon the Commission and the Council in relation to coal and steel (ECSC Treaty), atomic energy (Euratom Treaty), and agriculture/fisheries and transportation (EEC Treaty). In these sectors the member states are not absent, but the Community has comprehensive authority, of which it has made extensive use — although much less so in the case of transportation, where an overall common policy has not yet been adopted, than in the other sectors.

14.3 approximation of laws

- Under the Single European Act (1987), the Council, acting by qualified majority, may "adopt the measures for the approximation of the provisions laid down by law, regulation, and administrative action in

Member States *which have as their object* the establishment and functioning of the internal market".[1] However, unanimity is required with regard to fiscal provisions, provisions relating to the free movement of persons, and provisions relating to the rights and interests of employed persons; similarly, unanimity is required for those provisions of national law that *directly affect* (cf. "have as their object") the establishment or functioning of the common market.[2] The process for issuing directives for the harmonization of laws is initiated by the Commission, and involves a formal "cooperation procedure" with the European Parliament (see paragraph 36.2) as well as consultation with an advisory Economic and Social Committee. However, provided the required procedures are adhered to, the Council can and does act to coordinate the laws and policies of member states in overall budgetary policy, regulation of labour markets and wages policy, social security systems, health, safety, consumer protection, credit facilities, and "the application of the principle that men and women should receive equal pay for equal work."[3] Under the provisions of the Single European Act, a Community role, including financial assistance, was explicitly provided for in the fields of "economic and social cohesion" (mainly, regional development), research and technological development, and environmental protection.

14.4 mutual recognition of regulations

- In order to avoid massive centralization of regulatory activities within the Community, through the compulsory "approximation of laws", the Single European Act provided for an alternative mechanism to accomplish the same purpose. The Act required the Commission to draw up, in 1992, an inventory of national laws, etc., which had not been harmonized, and empowered the Council — by qualified majority — to "decide that the provisions in force in a Member State must be recognized as being equivalent to those applied by another Member State."[4]

15. The integration process: progressive curtailing of national powers

The above-mentioned devices establish the possibility that EC member states may, as the years pass, find their powers ever more sharply curtailed by the action of Community institutions. In a sense, the treaties are open-ended: they formulate principles and objectives, and stipulate that action shall be taken to implement or achieve them. Many of the relevant measures can be taken by the Council by qualified majority, so long as it is acting on a proposal made by the Commission and the European Parliament does not reject or amend it. Thus the Council may move into new areas, acting by qualified majority. In such cases EC member states entirely lack the protection that Canadian provinces secured for themselves in 1982, when they successfully asserted the principle of "opting out" of constitutional amendments that reduce provincial powers or proprietary rights.

16. *Opening up new areas of Community action*

The open-ended character of the integration process is underlined by Section 235 of the EEC treaty — there are analogous sections in the Euratom and the ECSC treaties — which reads: "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures." Unanimity is, it will have been noted, required. Nonetheless, the application of Section 235 provides for a form of constitutional amendment without reference to the legislatures of member states. Section 235 requires no public involvement, other than indirectly through prior consultation with the European Parliament. Under this clause the first steps were taken towards the achievement of economic and monetary union, the development of a common regional and social policy, a common policy for science and technology, and common environmental and energy policies.[5]

Chapter 4

Next Steps for the EC: The Integration Process ("Deepening")

17. "Europessimism" in the 70s; "Europhoria" in the 80s

The EC is continuing along its bumpy road to closer integration, both economic and political. As early as 1972 a "European summit" (heads of state and government, officially constituted since 1974 as the "European Council") adopted the objective of creating a European Union "by the end of the decade". A design was worked out, but under pressure of oil price shocks, worldwide inflation, and monetary disorder, a decade of "Europessimism" ensued instead. Integration appeared to be in retreat. Nonetheless, the 1980s saw a re-launch of the Community under pressure of competition from Japan and (to a lesser extent) the United States; business leaders began urging the consolidation of the common market and its transformation into a more general economic and monetary union — failing which, the EC seemed destined to fall behind its global rivals, especially in high-technology development. In the 1980s, the mood switched to "Europhoria".

18. The 1984 draft treaty on European Union

The most useful benchmark for assessing progress toward an economically and politically integrated Europe is a 1984 draft treaty to establish a European Union, a text overwhelmingly endorsed by the European Parliament. The draft treaty proposed a federal and more democratic form of government for a single Union combining the three existing Communities, and extending their functions. Under the terms of the treaty

- legislative authority would have been vested jointly in the Parliament and a new Council of the Union (consisting of permanent "Union Ministers" of the member states, and acting by qualified majority); the right of initiative would have been shared by the Commission, the Council, and the Parliament; laws would normally have had to receive approval from both the Parliament and the Council (which would become, in effect, an upper house);
- the Commission would have been transformed into a political executive reconstituted after each parliamentary election according to the following procedure: the President of the Commission to be nominated by the European Council, the President to nominate Commissioners after consulting the European Council, the Commission to submit a political program to Parliament, and to take office only after

Parliament approved the program; the Commission would have been responsible to Parliament, which could vote censure, thus forcing the investiture of a new Commission according to the standard procedure;

- the Court of Justice would have gained the power to impose sanctions on member states it judged to be in violation of the Treaty;
- the Union would have become financially autonomous from the member states, with the national parliaments being totally excluded from the Union's financial system;
- the competences of the Union would have been, with few exceptions, held concurrently with member states and exercised in accordance with the *principle of subsidiarity*, according to which the Union would carry out only those tasks that could be undertaken more effectively in common than by the member states acting separately;
- in the economic field, the Union would have achieved full integration of markets for goods, services, labour, and capital; it would have obtained exclusive competence regarding competition policy; it would have been committed to working towards monetary union; and it would have gained the power to implement common policies in certain sectors additional to those within the ambit of the existing treaties — telecommunications, research and development, industry, and energy (besides coal and nuclear energy);
- the Union would have obtained concurrent competence in social and health policy, and in particular regarding income security, labour relations, public health, consumer protection, environmental protection, education and research, and cultural and information policies; and
- the Union would have gained control over foreign policy and defence.

19. *Integration: assessment and prognosis*

Today, the EC is evolving in the direction set out in the 1984 draft treaty as regards areas of policy competence, but with relatively slight change as regards institutional structures. A rule change of great significance has already occurred with the introduction of qualified majority voting in the Council, covering most areas of economic policy in which the Community has competence (cf. paragraph 14); moreover, the role of the Parliament in Community decision-making has been strengthened. However, major institutional re-design has not occurred and does not appear imminent. Thus economic integration has proceeded and is likely to intensify, without a corresponding building-up of political machinery. Member states are proceeding further with the pooling of their sovereignty, but the system shows little sign of evolving towards federalism, and its "democratic deficit" (cf. paragraph 66.5) is growing with every new increment of Community authority.

20. The integration process: recent milestones

The European Council sets the pace for the integration process and takes the most significant political decisions regarding the future development of the Community. The following are recent milestones.

- 1985: on the basis of the Commission's White Paper, *Completing the Internal Market*, the Council commits itself to creating a market without internal frontiers by the end of 1992, and authorizes an intergovernmental conference to draft consequential amendments to the EEC treaty, including the necessary institutional or procedural changes (Britain, Denmark, and Greece vote against holding the intergovernmental conference, but do participate in it, because they judge that an "empty chair" strategy will be ineffectual — the rest of the EC may go ahead without them);
- 1986: all member states ratify the Single European Act (SEA), embodying the treaty revisions negotiated by the intergovernmental conference; the SEA enters into force in 1987;
- 1988: a serious political crisis, threatening the future of the Community, is avoided when the European Council reaches unanimous agreement on the financing of the Community over a five-year period, a package deal under which "structural funds" (e.g., for regional development) are expanded and the growth of agricultural subsidies checked, while alleviating the fiscal burden on the UK and Germany;
- 1990 (October): two new intergovernmental conferences are established, one on Economic and Monetary Union (EMU), and one on European Political Union (EPU), with a view to negotiating treaty revisions and having them in place by 1 January 1994 (the target date for Phase II of EMU).

21. Integration — the current agenda; role of the European Council and the Commission

The items currently on the European integration agenda are the completion of the internal market, EMU, and EPU. The European Council will take the key decisions; the more reluctant member states, such as Britain, may nonetheless be forced to go along for fear of being left out. The Commission is a driving force behind the integration process, although more so on EMU than on EPU, where a lead role has been assumed by the Secretariat General of the Council (a body which, unlike the Commission, is not an official organ of the Community, created by treaty). Broadly speaking, the Commission formulates positions that are not too far ahead of what the member states will tolerate, while publicly chivvying the laggards and invoking the European Parliament in support of closer integration. Thus the Commission's progress reports on the "1992" program, and its proposals for EMU and EPU, are probably the best available index of where (and how fast) the integration process is going. For this reason, the following paragraphs, reviewing the current state of play in relation to "1992" and EMU/EPU, draw heavily on recent Commission documents.

Completing the Internal Market: The "1992" Program

22. A market without internal frontiers

In order to ensure the free movement of goods, persons, services and capital, all border checkpoints and formalities are to be removed. The Council, in most cases acting by qualified majority, has issued the relevant directives, or made regulations, on about two-thirds of the 279 measures identified in the 1985 White Paper. Progress continues to be made, and committed "Europeans" like to describe the integration process as "irreversible". Nonetheless it is not absolutely certain that the target will be completely met, or on time.

23. Stumbling blocks: harmonization of the VAT

One of the biggest stumbling-blocks has been harmonization of the VAT (base and rates), which is deemed to be necessary in order to prevent excessive cross-border shopping. Agreement has now been reached on collection procedures and on harmonization of rates, representing significant progress towards uniformity; but it remains to be seen how smoothly the implementation goes, and whether the remaining discrepancies do, in practice, impede the removal of border controls. In the meantime, the Council has acknowledged that a "definitive" VAT system cannot be in place by January 1993. For this, the Commission is now targeting January 1997.

24. Implementation of Community directives and regulations

The transposition of Community directives into national law remains a problem, as does the implementation of Community regulations and decisions (which supposedly are directly applicable, without "transposition" by national legislatures).

- In November 1990 the Commission reported that member states had transposed about 70 per cent of the Council's directives into national law, but that Italy and Greece had fallen behind schedule "to a worrying degree".
- A further problem arises with respect to Community regulations and decisions, where the Commission in some cases lacks the necessary technical support and administrative structures to fulfil its management responsibilities (ensuring effective implementation).

25. Mutual recognition of national regulations

Although the Commission noted in November 1990 that the functioning of the integrated market depends "especially on the development of the principle of mutual recognition" of national regulations (as well as on carry-through on Community directives, and effective implementation of Community regulations), the Commission is only now beginning to prepare the way for implementing the Treaty provision on mutual recognition.

Economic and Monetary Union (EMU)

26. The decision to advance to EMU

In October 1990 the European Council, with Prime Minister Thatcher of the United Kingdom dissenting, committed itself to the goal of monetary union with a single currency (the écu) to replace national currencies. The British idea was to create a "hard ECU", or European

Currency Unit, which would not be simply (as at present) a weighted average of existing national currencies, but a thirteenth or "parallel" European currency; transactions could be denominated in either. Notwithstanding the British position, the Council's October communiqué envisioned achievement of EMU — with a single currency — in three stages, as proposed in a report by Commission President Jacques Delors in April 1989.

27. EMU: roadmap and prognosis

Given that an intergovernmental conference has now been charged with responsibility for mapping out the route to EMU, and major decisions have yet to be taken by the European Council, incorporated into a treaty, and ratified by national legislatures, it is impossible to be fully confident about how EMU will evolve, or even whether it will be achieved. Nonetheless, the main steps, outlined in the Delors report, are clearly defined.

28. EMU: Stage One

Stage One of EMU is a preparatory and planning stage, and involves the following elements:

28.1 Market integration

- completion of the internal market, including notably the abolition of all obstacles to the free movement of capital among member states;

28.2 The Exchange Rate Mechanism

- extension of membership in the Exchange Rate Mechanism (ERM) of the European Monetary System, under which participating states — at present, all EC states except Greece and Portugal — have promised to keep their respective currencies more or less in line with other European currencies. (Each country establishes an official parity rate between its own currency and the present-day ECU, representing a "basket" of European currencies; participating states have promised to prevent deviations of more than a fixed percentage from the ECU-parity rate: Britain and Spain allow a 6 per cent deviation on either side, while all others — the original six EC states, as well as Denmark and Ireland — allow only 2.25 per cent deviation. However, the system has not hitherto functioned with full reliability; there have been periodic adjustments to the parities, with the consequence that, for example, the deutschmark appreciated between 1979 and 1989 by 22 per cent in relation to the ECU, 45 per cent in relation to the French franc, and 58 per cent in relation to the Italian lira.);

28.3 Policy coordination: the Commission and Ecofin

- improved coordination of economic and monetary policies of member states, in accordance with plans to be submitted by member states, and monitored by the Commission and "Ecofin", a standing committee of economic and finance ministers (convergence of such policies is viewed as a precondition for a progressive tightening of the European monetary system, or narrowing of the range of fluctuation of national currencies around the ECU-parity rate that will lead, eventually, to the establishment of "irrevocable" parities); and

28.4 Treaty revisions

- preparation and ratification of treaty revisions, including a plan for a European Central Bank (ECB) that, together with the central banks

of member states, is to compose a new or reconstituted European System of Central Banks (ESCB: apparently an adaptation of the American Federal Reserve System).

29. EMU: Stage Two

Stage Two, targeted to begin 1 January 1994, is to cover the transition phase mapped out in stage one; it is to be a phase of institution-building and of acquisition of additional experience in economic and monetary management on a Community-wide basis. During this stage, the Community will act in a coordinating and advisory role in relation to member states, but will not yet have power of decision or of overriding member states, in these areas. Stage two is expected to involve the following elements:

29.1 Institutions: the ECB, Ecofin, and the ESCB; their role in relation to

- The ECB is to be established in accordance with a revised treaty, and is to report annually to the European Parliament; its policies are to be set by a council composed of the governors of national central banks and six directors named by the European Council, with representatives of Ecofin in attendance. Its anticipated role (which has not yet been clearly demarcated from the role of Ecofin) will involve it in defining the monetary policy of the Community and directing the activities of the ESCB, which is planned to be in operation not later than 1 January 1996. The responsibilities of the ESCB will be extended by the Council, acting by qualified majority or unanimously, into the following areas:

interest rates, money supply, exchange rate

  - the conduct of open market operations (buying and selling of government securities), with a view to controlling (i) interest rates, especially in the short term, or (ii) the exchange rate for European currencies in relation to non-European currencies, or (iii) the total money supply — whichever of these three linked objectives is given priority, the operations of the ESCB will affect rates of consumption and investment, the competitiveness of the European economy, and the tradeoffs made between controlling inflation and reducing unemployment;

international monetary cooperation

  - participation in international monetary cooperation (influencing world currency and debt markets, together with central bankers from the United States, Japan, etc., and controlling east European and Third World countries' access to credit);

currency reserves

  - management of the currency reserves of member states — reserves which eventually will be transferred to the Community;

regulation of banks

  - regulation of banks and other financial institutions within the Community, e.g., establishing rules for the deposit of cash reserves with a view to ensuring that the institutions remain solvent, and with a view to influencing the availability of credit to Community investors; and

developing the ECU

  - supervision of the development of the ECU as a currency unit reflecting the value of the most stable European currencies.

29.2 Community control of the states' fiscal policies

- The Council, acting by qualified majority on a proposal of the Commission, is to coordinate the budgetary policies of member states, and recommend specific budgetary guidelines to them — and to decide on appropriate penalties to be imposed when a member state persists in running an "excessive" budgetary deficit. The Council could also acquire a role in authorizing loans to member states in financial difficulties — but presumably under strict conditions; it is anticipated that both the ECB and the national central banks will be prohibited from simply financing any budget deficits of member states, in effect monetarizing their debts.

29.3 Convergence of economic policies: a precondition for full monetary union

- Not later than January 1997, the Commission and the governing council of the ECB are to report to the European Council on the success of the measures taken to bring about the convergence of the economic policies of member states, thus establishing the conditions for introducing a common currency; in effect, an assessment will be made of the Community's success in getting member states to rely on instruments of economic adjustment other than monetary and fiscal policy. On the basis of advice received from the Commission and the ECB, and after consulting the European Parliament, the European Council will decide when to proceed to the third and final stage of EMU.

29.4 Pressuring reluctant states: EMU may go ahead without them

- An essential point is that present thinking in the Commission and in some of the member states favours making the transition to stage three even if some EC countries do not participate in EMU, whether because they refuse to merge their national currencies with the écu, or because the lead states have concluded that some of their EC partners are not yet ready to participate fully in the new institutions, and to accept the economic disciplines or constraints implied by Community-wide rules and institutions. *Thus intense pressure may be put on "reluctant Europeans" to join the integration process — failing which they will see the train leave the station without them.*

30. EMU: Stage Three (full operation; controls on economic policies of member states)

Stage Three, for which no date-of-launching has yet been set by the European Council, is the stage of full operation, under which it is intended that

- the écu will replace national currencies as sole legal tender throughout the Community;
- the ECB, perhaps in conjunction with Ecofin, will direct the monetary policy of the Community, while national central banks are reduced to a role analogous to that of regional reserve banks within the United States (i.e., collectively they would participate in the decisions of the ECB, but individually they would be subject to its direction); and
- the Council, acting now by qualified majority rather than by unanimity, will exercise control over the budgetary policies of member

states on the basis of multi-year forecasts, and will prescribe — on the basis of these same forecasts — the orientation of other major aspects of the economic policies of member states, namely those affecting

- costs of production (while avoiding interference in collective bargaining processes);
- levels of savings and investment;
- "social and economic cohesion" (a phrase already appearing in the EEC treaty); and
- economic development within particular sectors and regions.

European Political Union (EPU)

31. EPU: basic aims

The two intergovernmental conferences, on EMU and EPU respectively, have been instructed by the European Council to coordinate their activities in order to make the necessary changes in the treaties in a single step. The thrust behind EPU is three-fold, and derives from: (i) ambition to extend the role of the Community relative to that of member states, especially but not exclusively in matters of security and foreign relations, (ii) concern over the existing "democratic deficit" within the Community, and (iii) desire to increase the effectiveness of Community decision-making and policy-implementing processes.

32. Redefining Community powers: foreign affairs

A primary objective of political union, and perhaps its essential feature, is the formulation of common policies on defence, and more generally on external relations, especially in the context of rapid changes in central and eastern Europe. Thus the Commission, echoing the voices of some of the heads of government, has urged that the emerging European union should have a political as well as an economic, monetary and social dimension, and should aim at the construction of a more just world order that is strongly committed to the protection of human rights.

33. Redefining Community powers: domestic affairs

The Commission also proposes that the Council, acting by qualified majority, gain the power to issue directives and/or mount programs in the following areas:

- regulation of labour markets: working conditions, consultation with workers, job security, and protection of the rights of workers (especially in the case of workers from other EC countries);
- labour force training;
- development of infrastructure within the Community, to facilitate the free movement of goods, services, persons, capital, and information;
- strengthening of mobility rights of workers, in part through the coordination or harmonization of national laws and regulations;
- energy policy: if possible, the implementation of a common policy in the energy field (as now in agriculture and fisheries) and

- cultural policy: while, in accordance with the principle of subsidiarity (cf paragraph 18, above, and paragraph 34, immediately below), national states will remain responsible for cultural affairs, "il serait bon toutefois de consacrer, dans un article, la dimension culturelle des actions communautaires, ce qui, en particulier, confirmerait l'importance des actions menées, par exemple, pour assurer la libre circulation des oeuvres audio-visuelles, encourager les créateurs européens, promouvoir la télévision à haute definition. . .."[6]

34. Redefining Community powers: the principle of subsidiarity

The Community would have concurrent, not exclusive, competence in relation to the above fields. The Commission supports a proposal of the European Parliament, under which the principle of subsidiarity would be inscribed in a revised treaty, in a manner giving it legal force, i.e., Community acts (directives, regulations, decisions) would be subject to after-the-fact review, presumably by the Court of Justice, "afin que l'exercice des compétences ne se traduise pas par des excès de pouvoir." The principle of subsidiarity could have the effect, in many cases, of limiting the role of the Community to the setting of general goals or guidelines that would be adapted to the needs of member states by the national governments (as is intended, in any case, with the issuance of Community directives). However, subsidiarity is at best a two-edged sword, as the following text proposed by the European Parliament implies:

> The Community shall act only to fulfil the tasks conferred on it by the Treaties and to achieve the objectives defined therein. Where powers have not been exclusively or completely assigned to the Community, it shall, in carrying out its tasks, take action wherever the achievement of these objectives requires it because, by virtue of their magnitude or effects, they transcend the frontiers of the Member States or because they can be undertaken more effectively by the Community than by the Member States acting separately.[7]

With such a wording, a principle that supposedly limits central power could have the opposite effect: the proposed text explicitly requires the Community to act where spillovers occur, or where common action will be more efficient than action undertaken at the level of the member states.

35. Democratic goals: citizenship and human rights

One aspect of EPU is to develop the concept and the reality of "European citizenship" existing alongside national citizenship. This could take the form of a declaration of rights (presumably of moral force only), and of enforceable treaty rights in two areas: (i) mobility rights within the Community for non-economic as well as for economic purposes

(the latter of which is already enshrined), and (ii) the right of EC nationals living in EC states other than their own, to vote in municipal elections and in elections to the European Parliament.

36. Democratic goals: accountability and control

An important feature of EPU is to make processes of governance more democratic or, as the jargon puts it, to reduce the Community's "democratic deficit". Two approaches are under discussion: (i) to strengthen the role of the European Parliament, and (ii) to more fully associate national parliaments in the affairs and decisions of the Community. A Commission proposal on EPU (October 1990) discusses both approaches, but clearly favours the first.

36.1 Role of the European Parliament vis-à-vis the Commission

- The Commission plays a vital role in Community decision-making processes: in most matters, the Council cannot act, except on a proposal by the Commission; if the Council amends a Commission proposal, it can act only by unanimity, even if the subject is one that normally requires only a qualified majority;[8] the Commission draws up and proposes the Community budget; it negotiates international trade agreements on behalf of the Community; it exercises broad administrative and treaty-implementing powers, and a supervisory role in relation to member states to see that they are fulfilling treaty obligations and implementing Council directives; and it makes proposals — both on its own initiative and on request from the European Council or the Council of Ministers — regarding the further development of the Community through treaty revision.

  Yet none of the Commissioners is elected, and the Commission is not, in practical terms, responsible to any elected body. The European Parliament can censure it and in doing so force its resignation, but the Parliament cannot bring about the appointment of a new Commission with a program of which it approves. An implication: voters know that elections to the European Parliament cannot bring about a change of personnel in the top policy-making echelons of the Community. (Note the contrast on these matters with the proposals of the European Parliament in its 1984 draft treaty on European Union, cf. paragraph 18, above.)

  Although the Parliament would like to gain the power to name new Commissioners, or at the very least to confirm the Council's nominees on an individual basis, member states refuse to give up or dilute their power in this way. The Commission has proposed a compromise measure: Parliament would confirm the nomination of the President; the remaining Commissioners would be nominated jointly by member states and the President, and their nominations would be confirmed *en bloc* by the Parliament. However, all member states would have to agree to the necessary treaty revisions to bring this about.

36.2 Legislative role of the European Parliament

- In most cases where the Council takes decisions by qualified majority, the treaty prescribes that the Council shall act "in cooperation with the European Parliament". Under the "cooperation procedure", which was one of the innovations of the Single European Act:
  - a proposal amended by the Parliament is channelled back to the Commission; if the Commission endorses the proposed changes, the Council may adopt the measure by qualified majority; if the Commission does not endorse the changes, the Council may still adopt the measure if it acts unanimously; and
  - a proposal rejected by the Parliament may nonetheless be adopted by the Council, acting by unanimity.

  Parliament proposes, instead of this procedure, a "co-decision" rule, under which Parliament could exercise an absolute veto. The Commission's proposal, made in response, is to leave the existing cooperation procedure mostly intact. Its sole concession is that a proposal amended by the Parliament, if agreed to by the Commission, would be considered approved unless vetoed by the Council.

36.3 Role of the Parliament on budgetary matters

- The Parliament's budgetary powers are already significant, and only minor changes have been proposed in the context of EPU. The present situation is as follows: Parliament may propose amendments to a draft budget; approval of the amended budget requires only a qualified majority in the Council of Ministers. In addition, the Parliament may reject a draft budget and ask for a new one; up to now, it has rejected two main (annual) budgets and one supplementary budget. According to two informed observers:

  > Even though Parliament's actions have not always produced the intended effect on decision-making in the Council, they have in any event forced the Council to treat the Parliament in the budgetary procedure as a discussion partner on a wider field than that covered by the budget in the strict sense. In practice the European Parliament's powers in relation to the Community budget are greater than those of various national parliaments in relation to their own national budgets.[9]

37. Democratic goals: involvement of national parliaments in Community affairs

The suggestion that national parliaments be somehow involved in Community decision-making — as opposed to augmenting the powers of the European Parliament — is sometimes put forward as a means of reducing the democratic deficit. The Commission is willing to countenance the holding of information sessions attended by delegations from national parliaments, and it suggests vaguely that the European Parliament might look for ways of coordinating with national parliaments, but otherwise it is forthrightly hostile. This is understandable. The main way of involving national parliaments in Community affairs would be to give the relevant parliamentary committees greater control over their

respective governments' behaviour in Council. Today, the practice of member states on this varies widely. However, the more closely the national parliaments constrain their governments' bargaining positions in the Council, the more difficult it becomes for the Council to achieve compromise. Such an approach to democratization would clearly paralyse the Community.

38. Effectiveness of Community action

To increase the Community's policy effectiveness, the Commission proposes a number of rule changes within the existing institutional framework. One such change would be a shift to decision making by qualified majority in the Council of Ministers, replacing unanimity in the fields of the environment, research and technology, and certain (relatively minor) fiscal matters. The Commission has also given notice that it may be bringing forward proposals to ensure that member states faithfully implement rulings of the European Court of Justice, noting: "Il est très préoccupant que des arrêts de la Cour de Justice restent inexécutés faute de sanctions."[10]

The Integration Process: An Overall Assessment

39. Goals for integration: the 1984 draft treaty

The "1992" program, and the agendas and proposals now before the two Intergovernmental Conferences on Economic and Monetary Union and European Political Union, would go a long way towards realizing the vision contained in the European Parliament's 1984 draft treaty on establishing a European Union — but with two notable exceptions. First, there would be no major institutional redesign that would give the European Parliament "co-decision" with the Council in the enactment of legislation, and that would transform the Commission into a political executive effectively under control of the Parliament; and second, the Community would not gain its financial independence of member states. These omissions or exceptions from the 1984 project raise significant questions about the democratic character of the evolving European Community, and about the potential scale and effectiveness of its operations, given limited and not absolutely secure fiscal resources. One implication of the fiscal situation is that the Community's role in redistributing incomes among individuals living in different member states, or in assisting the poorer states to provide an adequate or minimal level of public services, will necessarily remain extremely limited.

40. The uncertain dynamic of the integration process: reasons for caution

One ought not to take for granted that the "1992" program will be fully implemented by the target date; still less should one assume that progress towards EMU and EPU is inexorable or irreversible. The major decisions on EMU/EPU, even of principle, remain to be taken. The treaties can be amended only by unanimity, and some of the member states, such as Denmark, require approval in a national referendum before ratifying. Conceivably, some states will want to go ahead on the basis of a negotiated text, and others will refuse. In that case, it may be possible to proceed with some but not all: this would be the concept of

"une Europe à deux vitesses" (to employ the expression of President Mitterand in 1984),[11] or a "Europe of concentric circles" (to employ a more current phrase suggesting that monetary union may be brought about with some, but not all, members of the Community). If, however, there is a real or significant prospect that the integration process will go ahead only within an inner circle — presumably to include the six original members of the Community — the others, notably Britain, may be forced to go along. Britain seems to have concluded (indeed, the revolt against Mrs. Thatcher seems to suggest this) that it cannot afford to stand on the sidelines while the core states design and build a more perfect union.

Chapter 5

Lessons for Canada

41. The EC: An appropriate model?

Should Canada borrow some features of EC institutions and practices, and adapt them to Canadian needs? That will depend, in the first instance, on whether Canadian purposes are similar to those of EC member states. (Our focus here is on economic purposes, although both the EC and Canada had, at their inception, political or security-related purposes as well — and these remain important.)

Purposes of Economic and Political Union

42. The basic aim of economic union: efficient use of economic resources

The primary economic purpose for which the EC was established was to create a bigger market, in order to use labour and other resources more efficiently, thus raising living standards. In the Canadian case, we seem to be agreed that it would be desirable to preserve the existing economic union for at least two reasons: (i) to avoid disruption of existing trading patterns — in other words, to avoid heavy transition costs to new economic arrangements, and (ii) to promote economic efficiency over the longer term — a resource-allocation argument, similar to the one invoked in Europe in support of economic integration. In short, Canadians want to preserve the "economic space" that earlier periods of nation-building created, and many, including leading Quebec *indépendentistes*, have declared in favour of going a step further and actually strengthening the economic union.

43. Supplementary aims of economic union: the positive state and economic well-being

There may also be additional, complementary reasons for forming or preserving an economic union. All of them require positive action by government, achieved either through jointly directed political control of the economy by member states (i.e., within a confederal union), or through the action of a central government (i.e., within a federation). These supplementary purposes of economic union, appropriate to the era of the positive state or the mixed economy, and requiring some form of political integration, are

- to increase *economic stability*, for which the main instrument is macro-economic management (fiscal and monetary policy); other relevant policies involve public expenditure, and in Canada include price stabilization for natural resource products (especially farm

products), unemployment insurance, and stabilization grants to provincial governments (compensating for any sudden drop in provincial revenues);

- to gain or retain *power in the international economic system* — in the Canadian case, to preserve our role and weight in the GATT, in the counsels of the G-7, and in relation to the United States; and
- to strengthen *economic performance* through a set of governmental initiatives that complement and support the activities of the private sector — for example, labour force training or skills development, science and technology, industrial restructuring, mixed enterprise (partnerships of government and business), export promotion, and regional development.

44. Political union: integration; redistribution of gains

The purposes of economic union, whether in Europe or in Canada, are clear. On the other hand, whether or not political union — or whether a particular *form* of political union — is needed in order to achieve economic purposes is both less obvious and more contentious. (Non-economic purposes, such as to express or respond to nationalist sentiment, or to achieve greater physical security, are obviously important, but are not the subject of this paper.) Limiting ourselves, then, to the economic purposes of political union, two arguments may be put forward: (i) that economic integration will not occur, at least not to the desired degree, without a form of political union, and (ii) that the benefits secured through economic integration cannot be fairly distributed on a regional basis, except through political union. The following considerations apply:

- To the extent that regional disparities exist, redistribution may be required, whether through a set of centrally-financed social policies (income support), or through a system of intergovernmental transfers, or through a combination of both.
- Commitment to a redistributive scheme may be a *quid pro quo* demanded by the fiscally weaker states within a regional grouping, to gain their support for new steps along the integration road. This was the case in the EC when the Single European Act (SEA) was negotiated, and the issue has re-surfaced with greater force during the current negotiations over EMU.
- Analogous issues may arise in Canada in the case of a restructuring of the present economic and political union. To the extent that the existing political framework is called into question, the economic union too may come under scrutiny.

45. Some Quebecers lack interest in the supplementary aims of economic union

Some Quebecers have little or no interest in preserving the supplementary purposes of economic union — i.e., those associated with the positive state.

- These people have lost confidence in the federal government's ability to keep the economy on an even keel. In fact, it has been argued that because of steady increases in the national debt — it now takes 35 per cent of federal tax revenues to pay interest charges — the federal role is more *destabilizing* than stabilizing, and seriously handicaps economic performance.
- The federal government's role in defending or promoting Quebec's interests in the international economy is evidently discounted; it seems to be widely assumed that the Quebec government would do as well or better. Potential difficulties in re-negotiating the FTA on a trilateral basis (United States – "Canada" – Quebec) or quadrilaterally (including also Mexico) are disregarded, as are possible concerns about the actual operation of the agreement (e.g., dispute settlement).
- While the role of government in complementing and supporting the private sector is not discounted by Quebec elites, some appear to regard the "positive" activities of government as being more appropriately and more effectively carried out by the province than by the federal government.

46. Redistribution no longer a big factor

In addition, Some Quebecers are apparently prepared to opt out of the redistribution that has been built into the federal system. For them, the era of *fédéralisme rentable* is over.

47. Outside Quebec: demands for a "stripped-down" federal government

Outside Quebec too, the economic and redistributive roles of the federal government are being re-examined. The appeal of a "stripped-down" federal government is apparently mounting, at least among those who are economically secure. There are now many voices calling for a reduction of federal powers and fiscal resources, while retaining a common currency and preserving an "economic space" without internal frontiers.

The Decentralist Project and Economic Union

48. Political preconditions for removing internal barriers, or preventing their emergence

If federal economic powers and/or fiscal resources were significantly reduced, what would be the consequences for the economic union? Would internal barriers inevitably arise, or existing ones grow in importance? EC experience may be highly relevant on this point, because the testing-ground for the "1992" project, and even more for achieving EMU, has become the ability to formulate and implement policies in common. For EC member states, the lesson of the 1980s was that "completing the internal market" required strengthening the policy capacity of central (Community) institutions, and, correspondingly, curbing the independent decision-making power of national states. By 1985, political and economic leaders in the EC had concluded that the integration process would go into reverse gear unless the states agreed to advance to a new stage of integration; if the Community tried simply to stand still, it would begin to fall apart. The attribution of new competences to

the Community, and decision making by qualified majority, were two steps regarded as inevitable and indeed indispensable in the era of the positive state or mixed economy. This process must be carried further if "1992" and EMU are to be achieved.

49. The economic case for a strong central government in Canada

A possible inference is that in Canada the main economic functions of government must inhere in the federal government, if an integrated economy is to be preserved — and of course, even more, if existing internal barriers are to be lowered or removed. There is a case to be made that EC experience shows how important it is for Canada to have a strong and active federal government with reconfirmed or even augmented powers over the economy. *This implies a political model of which the underlying thrust is re-dedication to the task of building or strengthening the Canadian economy, and ensuring a fair distribution of the gains derived from economic union.*

50. The social case: redistribution

The (re)distribution issue has involved the federal government in social policy; indeed, at present, a large part of interregional redistribution takes place through federal programs such as unemployment insurance. It follows that radical decentralization of social policy would augment economic inequality in Canada, unless there is a compensating increase in intergovernmental transfers. Only with a vast expansion of the equalization program, or other equivalent measures, would it be possible to avoid the erosion of standards of public services in the poorer provinces. Thus the achievement of equity goals requires a fiscally strong central government — either to mount its own redistributive programs, or to make cash payments to provincial governments.

51. Counter-arguments

Several arguments have been raised against the strong-central-government model, and in favour of devolution of powers to the provinces. The arguments, all of which address the market integration issue but not the equity/redistribution one, are

- that the dominant position of the United States in relation to Canada renders a strong federal presence in the economy both futile and unnecessary, because the provinces will be kept in check anyway by Washington and New York (an argument for province-building in a continentalist context: cf. paragraphs 52 to 56);
- that, in general, governments interfere too much in the economy, and federal powers over the economy could therefore be cut back, as long as provinces agree not to raise barriers against each other (an argument for economic liberalism and non-discrimination agreements among provinces: cf. paragraphs 57 to 62); and
- that the provinces are capable of negotiating and putting into place a common economic policy, while the federal government plays a minor or facilitative role (an argument for provincial economic activism, and the close coordination of provincial policies: cf. paragraphs 63 to 66).

Province-building and Continentalism

52. *Realpolitik* and US economic dominance

The first argument is a *realpolitik* one. It holds that the dominant position of the United States within North America requires Canada to follow the US lead on stabilization policy, and to conform to US-set rules on trade (which indirectly constrain or control government initiatives on economic development and adjustment). Thus the presence of the US on our doorstep requires adaptive behaviour by Canada; efforts to buck continental trends will be damaging and counter-productive. But if adaptation is the name of the game, provinces are well suited to play it. In fact, perhaps they are better placed to do so than decision makers in Ottawa: given the highly regionalized character of the Canadian economy, the provinces should have full power to do what they can or want to do, within confines set unilaterally by the US or multilaterally through the GATT.

53. *Province-building within narrow parameters set by the US*

This argument implies a constitutional model that allows for and even prescribes activist provincial governments; in fact, it is a 1970s-style province-building model adapted to the realities of the 1990s and to the conditions anticipated to obtain in the 21st century. The model envisions a federal government that is diminished by loss of power both to the provinces and to the international system (mainly to Washington). It assumes that bilateral ties between the provinces and the American states, and between the provinces and the US national government, will increase in intensity and importance; further, it assumes that the role of the Canadian federal government in creating the framework for such bilateral relationships will be slight, or indeed that its involvement would be superfluous.

54. *EC and EFTA: relevance to Canada*

If this scenario applies, EC experience is of virtually no relevance to Canada, but that of EFTA (the European Free Trade Association: Austria, Finland, Iceland, Norway, Sweden, and Switzerland, with Liechenstein as an associate member) may be. The EFTA member states have treaties of association with the EC, and to some extent are required by the EC to act in concert; it is scarcely an exaggeration to say that the EFTA's internal coherence, such as it is, has been imposed on them by the EC. The EFTA states have had to adapt to EC rules, and therefore have to some extent harmonized policies among themselves; moreover, the prospect of an EC-EFTA umbrella trade agreement, now under negotiation, has driven the EFTA countries to adopt something like a common external commercial policy. Significantly, the EFTA states (first Austria, then Sweden, and soon, perhaps, Norway) are tending to opt for full membership in the EC if they can get it; the gravitational force of the EC is too strong to resist, and is tending to turn its neighbours into satellites.

55. *North America: continental integration*

The North American analogue of EC-EFTA could be a continental free trade area encompassing the United States, Canada, and Mexico. The

analogy would be more complete if Canada were fragmented into two or more successor-states, each of which had a separate treaty of association with the US — perhaps as a prelude to full absorption of some of the present-day provinces. However, all this lies beyond a fork in the road. The more immediate issue is whether a more decentralized form of federalism emerges but the economy remains integrated, essentially as a result of US dominance. Under this scenario, the provinces would take over certain present-day federal responsibilities but find that, in practice, what they do must pass the test of acceptability to American corporations, organized interests, and political élites.

56. Resisting US control: two approaches

Some will find this scenario attractive; others will be repelled by it. Those who are uncomfortable with the prospect of Canada's being drawn ever closer into the orbit of the US — economically, socially, and culturally — will look for means and instruments of resistance. The most obvious recourse is to strengthen the federal government, or at least to prevent the parcelling-out of its powers to the provinces, which could have the effect of making each of them increasingly vulnerable to American pressure. However, there are two other options which should also be looked at: (i) to strengthen the Canadian economy (improve the efficiency of resource allocation, increase competitiveness) by reducing political control of the economy, while preventing the emergence of new interprovincial barriers and removing existing ones; and (ii) to create new political machinery and processes for coordinating the economic activities of provincial governments. Both options are arguably consistent with — some would say require — a reduction of the federal presence in the economy.

Economic Liberalism and Non-Discrimination Agreements Among Provinces

57. Smaller government; negative integration

The second argument supporting the transfer of economic powers to the provinces, and suggesting that decentralization need not lead to economic fragmentation, reflects a preference for de-regulating markets and shrinking the public sector. It holds that the preservation and strengthening of the Canadian economic union is a prerequisite for strengthening Canadian economic performance, and is perfectly consistent with devolution of most of the economic functions of government to the provinces. All that is needed, according to this argument, is for the provinces to agree among themselves not to interfere with the free flow of goods, services, labour, and capital.

- The concept employed here (explicitly or otherwise) is *negative integration,* meaning that the states or provinces belonging to a common market need merely accept constraints on what they do. In other words, they need only promise not to discriminate against each other. Negative integration contrasts with *positive integration,* where the coordination of policies is required. The argument is that negative

integration in itself creates a single market if governments adopt a laissez-faire policy, and that positive integration is needed only in the era of the positive state or mixed economy.

- The model associated with this argument calls not just for a stripped-down federal government, but for shrinking the role of government altogether. It is a response to the voices calling for minimal interference in the allocation of resources through market processes.
- Fiscal retrenchment is an aspect of the model, which implies not only that the social responsibilities of government be decentralized, but that interregional redistribution (in part through intergovernmental transfers) be sharply reduced.

58. The EC before 1985: mainly negative integration?

This argument/model corresponds (whether its proponents are aware of it or not) to pre-1985 conceptions of the European Community as a grouping of states that had committed themselves to a scheme of integration of a mainly negative character, with a strictly limited degree of joint decision-making.

- Only in one area — agriculture — was there to be a common policy, the purpose of which was to blunt or deflect the pressure of market forces, in order to bring about non-market allocation of economic resources. Significantly, the Common Agricultural Policy (CAP) was an essential part of the original (1958) bargain, under which France got EC-wide price guarantees for its farm products — i.e., social benefits for its farm population — in return for opening its borders to West German manufactures. This deal-making illustrates how the liberalization of markets may be made acceptable to relatively weak or vulnerable states, if redistributive schemes are included in the package; the CAP was a precursor of other trade-offs built into the Single European Act in 1987, and are a subject of current attention under the EMU negotiations (the Commission has proposed the further expansion of structural funds, or regional development programs, reportedly in order to deflect a Spanish demand for a form of overall fiscal equalization).
- The non-agricultural sectors in which the Community was assigned power to establish common policies are: fisheries (where Community regulation has come about as an extension of its powers under the CAP), coal and steel, atomic energy, and transportation. In all these sectors, the main thrust of the policy mandated under the treaties was liberalization and non-discrimination against other member states.
- The two other areas of Community competence under the Treaty of Rome, trade policy and competition policy, were non-sectoral. In both cases, liberalization ("lowering of barriers to trade") is an explicit objective, written into the treaty. It was expected that the dis-

cretionary authority of the Commission would be exercised — as, broadly speaking, it has been — in such a way as to favour the allocation of resources through the market.

59. The EC today: positive integration and removal of internal barriers

However, the last 10 years of EC history have clearly demonstrated the shortcomings of merely negative integration. The 1980s have shown that the removal of internal frontiers could be achieved only with a substantial degree of decision-making in common, or at least harmonization of the policies of member states.

- The role of the Commission has broadened; the extent of its discretionary authority — for example, in industrial policy, as a result of its power to prohibit public subsidies to national industries — has become clearer; and the Council increasingly takes decisions by qualified majority (eliminating the veto and fundamentally altering, for example, the strategies adopted by organized interests).
- Community competences have been extended into new areas such as environmental protection and worker safety. Common or harmonized "framework policies" such as laws on takeovers and mergers, patents and intellectual property, fraud, bankruptcy, and even corporate taxation have been judged necessary or desirable in order to dismantle internal frontiers.
- Member states have agreed to recognize each others' regulations on matters such as product standards, and to rely on each others' enforcement of them.
- If monetary union is achieved, member states will, by definition, lose control over interest rates and the exchange rate (as they have already done, to some extent, under the European Monetary System). Furthermore, it appears that the fiscally stronger and more conservative states, Germany in particular, will insist that no state be allowed to join the prospective monetary union except under an enforceable agreement preventing it from running excessive budget deficits (cf. paragraphs 29.2 to 29.4, above). Thus member states will lose autonomy, too, in the field of fiscal policy.
- Even the overall size of the public sector in individual states is projected, in effect, to come under a degree of joint control. This outcome results indirectly from harmonization of tax policies, a precondition for removing border controls under the "1992" program.

60. Opting out: unheard of in the EC

The notion that a member state could opt out of a Community policy, or exempt itself from a Community-level decision on the grounds that it infringes national sovereignty or marks an extension of Community competences, is unheard of. If there is a Community policy, member states are bound by it. Their acceptance of the discipline they impose on each other through the Council, or that is imposed on them by the Com-

mission and the Court of Justice in accordance with treaty provisions and/or Council decisions, is something they must agree to if they are to have access to each others' markets.

61. An EC lesson for Canada: inadequacy of negative integration

There should be a very clear lesson in all this for those Canadians who apparently believe that a fully integrated market can be preserved, so long as the provinces enter into non-discrimination agreements with each other. They are simply wrong. A unified economy cannot be preserved if Canada comes to rely on the instruments or techniques of negative integration. EC experience clearly shows that barriers will arise in the absence of positive integration, i.e., the formulation of common policies in some areas, and coordination or harmonization in others.

62. The need for positive integration in Canada: but by what means?

In sum, it is foolish to imagine that provinces could take over responsibility for the major economic functions of government, and thereby gain control over the course of their future economic development. Either US domination makes a mockery of those policies, or they result in the emergence of new and debilitating interprovincial barriers, or both phenomena occur, in some degree, together. *Conclusion: to the extent Canada has any latitude to act independently of the United States, there must be extensive decision making in common, on a Canada-wide basis; the only question is: through what mechanisms and processes — federal or confederal?*

Interprovincial Coordination: Confederalism

63. Coordinating economic decision making by the provinces

A third argument supporting the transfer of powers over the economy to provincial governments, while maintaining that the enfeeblement of the federal government need not result in fragmentation of the Canadian market, posits joint decision making by the provinces. This argument turns the province-building/continentalist one on its head, and takes its distance from economic liberalism. It holds that a positive role for government in the economy is essential *especially* in view of the presence of an economic giant on our doorstep, and that a common policy framework for the Canadian economy is required in the mutual self-interest of every province or region. However (the argument continues), these things do not require a federal government that acts independently of the provinces, or has the capacity to constrain them or impose its will on them. On the contrary, it requires (or at least is consistent with) an approach to economic decision making that is led by the provincial governments and is in large measure negotiated among them. The objective, then, is better cooperation — more joint action, greater policy harmonization — among provinces; the role of the federal government, or alternatively of central institutions of a confederal character, should be facilitative, not directing.

64. Relevance of the EC model

Of the three decentralist models, this is the one most clearly imitative of the European Community, although perhaps relatively few of those who

invoke the EC as a political model for Canada recognize the fact. (It would appear that a more common perception is that the EC shows how provincial governments could assume broad control over their respective economies, without thereby entailing the break-up of "the Canadian common market", so long as the provinces negotiate a set of non-discrimination rules.) Much emphasis is placed by some Quebecers — among whom the attraction of an EC-type system is strongest — on the transfer of federal economic powers to provincial governments, or at least to Quebec. However, they seemingly neglect the essential counterpart to such a move: the creation of new institutions to act on behalf of the provinces (or Canada's successor-states) internationally, and to require individual provinces/states to comply with and implement jointly-made but non-unanimous decisions.

65. Its advantages:

The political system that has been developed to manage the common affairs of the EC has a number of advantages, relative to the Canadian federal system.

65.1 Regional factors always evident

- The necessary involvement of the member states in decision making at the centre ensures full exploration of regional considerations affecting Community decisions. This observation applies most clearly to actions by the Council, composed of states' delegates. However, decisions of the Commission are also sensitive to regional factors and are taken in full awareness of the viewpoints of the states. Such sensitivity is a natural outcome of the facts that (a) Commissioners are appointed by the states, and (b) by convention, the Commission routinely consults state governments before taking decisions affecting them: each state government has full opportunity to present its case before a decision is made.

65.2 States' commitment to common aims

- In the Council, member states review each others' policies when they are of mutual concern, and take decisions jointly. This encourages them to act responsibly on Community-wide issues: if the states do not take account of the interests of the Community as a whole, no one else can. (The Council, and individual member states, may be prodded by the Commission and perhaps by the Parliament, but no "super-government" exists to act on behalf of the Community, while member states defend a merely regional/national interest.) In this respect, then, the confederal pattern of decision-making is a source of strength for the Community.

65.3 Transparency

- Community decisions are always justified as an exercise of power under the treaty; both the objective and the power-conferring clause are cited. Thus Community actions are taken in fulfilment of aims to which all member states have subscribed, and on the basis of powers they acknowledge to be legitimate.

65.4 Fiscal discipline and macro-economic management

- Member states are starting to exercise fiscal discipline over each other, and have always exercised fiscal discipline over the Community itself. An analogous "mutual control system" in Canada could improve macro-economic performance. In a situation where (as at present) complaints are arising over the federal government's inability to curb its deficit, and where (as is increasingly recognized) the fiscal behaviour of any major province may adversely affect the interests of other provincial governments and other regions, some control mechanism appears very attractive. With federal and provincial governments operating on the scale they do in Canada, macro-economic management cannot be effectively conducted by the federal government alone.

65.5 The Commission as neutral arbiter

- In the EC the Commission frequently acts as treaty-enforcer and as the administrative arm of the Council. In these capacities it can claim to be a neutral body, even when exercising its very considerable degree of administrative discretion. What it does, it does in furtherance of agreed-upon goals and principles, even when it acts to bring a member state under control (e.g., by initiating litigation before the Court, or by exercising its administrative discretion). As agent of a common interest, its position is quite different from that of the Canadian federal government, the activities of which may put it in opposition to most or all of the provinces. This form of intergovernmental conflict could not arise in the EC, where the Commission may enter the lists against a particular member state, but not against the member states as a group.

66. Disadvantages of the EC model:

Notwithstanding the advantages of a confederal style of decision making, the system would have obvious limitations and disadvantages if "imported". Canadian expectations of government — reflecting, in part, the past actions of the federal government in building a transcontinental economy and in creating a sense of shared citizenship — may be impossible to fulfil under a confederal system, especially in view of conditions extant here. The latter include: the US presence; the size of the Canadian federal public sector, and the cost of debt service; and the prevalence of political norms not characteristic of most European countries, e.g., an adversarial style of government-opposition relations, and a relatively populist political culture, if compared with the relatively élitist patterns prevalent in Europe.

66.1 Limitations of cooperative decision making

- Under a confederal system, or even under a federal system in which a majority (or a "qualified majority") of the states must agree to all major legislative initiatives, responsiveness to the strongly-felt needs of a particular group may be blunted. For example, in Canada it is unlikely that, under a confederal system, the Official Languages Act could have been passed; that a system of supply management for dairy products could have been introduced or could now be sus-

tained; or perhaps that the present program of fiscal equalization could have be put into place. Laws or programs that have been acceptable in the sense that public opinion was not mobilized against their passage, or that, once in place, have gained broad public support, might never have come into being under a confederal structure. Some will say that none of these laws *should* have been passed. Thus, it may be claimed that these cases demonstrate the unwisdom of making major decisions without first ensuring there exists a widespread regional consensus in a highly regionalized country, as confederalism requires. But that opinion merely identifies the trade-off to be made between institutional systems that permit governmental responses to minority demands provided no majority rejects them, and institutional systems that prevent decision unless multiple constituencies explicitly assent. The first option is more alive to the dangers of *immobilisme*, or decision making on a "lowest common denominator" basis; the second, to the danger of making decisions that are not sufficiently supported by constitutionally protected groups or constituencies.

66.2 Costs of decentralization borne by the poor and by minorities

- To generalize, it seems likely that federalism — as compared with confederalism — facilitates decisions or policies that confer a substantial benefit on particular groups, and that spread the costs across a wide segment of the population. Thus, programs having redistributive effect across provinces are likely to be more generous or more easily brought into existence if the federal structure of Canada is retained — as are all other types of policy initiative catering to regionally concentrated ethnic, religious, or cultural minorities. To be more blunt about it: if the federal government loses jurisdiction to the provinces on a wholesale basis, and/or if federal decisions are made subject to multiple regional or provincial vetoes, the losers are likely to be (i) the poorer regions or provinces, (ii) the economically vulnerable residents of the poorer provinces, and perhaps the economically vulnerable everywhere, and (iii) linguistic and other cultural minorities, including aboriginal peoples. This is not an allegation of public intolerance or lack of generosity in certain provinces or regions; it is a conclusion based on analysis of how one set of institutions will function, as compared with a different set of institutions.

66.3 Loss of clout in the international economy

- A matter of great importance is the capacity of governments in Canada to defend and promote Canadians' economic interests vis-à-vis the rest of the world, and especially the United States. It seems unlikely that this could be as effectively done under a confederal system as under federalism. However, this is a complex subject that deserves thorough investigation, including detailed study of how the EC conducts trade negotiations and other aspects of international economic relations.

66.4 Fiscal arguments

- Any comparison of the EC and Canada as governmental systems must take into account the vast difference in scale of operations. It will be recalled that the Community is fiscally dependent on the member states (cf. paragraph 12.3). In this situation it is hard to imagine how the EC's institutional structures could be effective in a Canadian setting, given that federal public expenditure in Canada is 20 times that of the Community, in proportion to the size of the economy. The EC budget, it will be recalled, is scarcely more than 1 per cent of gross domestic product, whereas in Canada, in 1990
  - total federal expenditure was 22 per cent of GDP;
  - total federal program spending was 11.9 per cent of GDP (down from a high of 14.4 per cent in 1984);
  - transfers to provincial governments were a further 4 per cent of GDP (down from a high of 4.5 per cent in 1985); and
  - interest payments on the federal debt amounted to 6.3 per cent of GDP (up from 2.3 per cent in 1976, and 4.7 per cent in 1984).
- Thus, even if the federal government were to be abolished, it would still cost Canada's successor states six times the total EC budget (expressed as a percentage of GDP) merely to service the debt they inherited — unless the debt were repudiated. *In the EC, the allocation of costs among member states is a major source of contention, and has provoked more than one political crisis that has threatened the continued existence of the Community; as has been mentioned, the states' willingness to continue financing its operations has been dependent on the outcome of disputes over its spending priorities. One cannot imagine the system continuing to function if the stakes were (to draw the Canadian comparison) 20 times as great. Conclusion: even if, in Canada, federal program expenditures were halved — which is not being recommended here — it would still be necessary to have a fiscally independent, and fiscally strong, federal government. Federal expenditures would still be, proportionately to GDP, at least 15 times as great as those of the Community.*

66.5 Democratic issues

- Complaints about the non-democratic character of "executive federalism" in Canada would be multiplied a thousandfold if an EC-type governmental system were established here. It will be useful to recall the complaints that are, increasingly, being voiced in Europe about the Community's "democratic deficit".
  - The main legislative power is vested in a 12-member Council which is not directly elected, deliberates in secret, and has the power to override the directly-elected Parliament (cf. paragraph 12.1).
  - The Council may issue directives to the national legislatures, requiring them to modify existing laws and/or pass new ones; a member state may be judged in default of its treaty obligations if it

fails to implement Council directives, regardless of the ability of national governments to obtain passage of the required legislation (cf. paragraph 12.5).

- The Council may, by unanimity, bring about a form of constitutional change by taking "appropriate measures" that exceed its powers under the treaty, so long as those measures are judged necessary to obtain the objectives of the Community (cf. paragraph 16).
- Sole right of legislative initiative is possessed by an appointed body, the Commission, which has acquired a uniquely strong position as mediator and even arbitrator among viewpoints of the national governments, when the Council is empowered to act by qualified majority.[12] Because the Commission may withdraw a proposal at any time, and because amendments to a Commission proposal require unanimity, the Commission is not only a *de facto* participant in the Council, it is the only "participant" that (as long as unanimity is not required) has the power of veto (cf. paragraphs 12.2 and 36.1).
- The Commission exercises, independently of the Council, extensive discretionary powers relating to the application of the treaty and the enforcement of common market rules; these powers include prosecution of member states for infringement of the treaty or of Community directives, a limited power of regulation, and the approval — or otherwise — of state aids to industry (cf. paragraphs 12.4 and 14.1).
- The Commission is, in practice, not politically responsible to any elected body, although the Parliament has gained significant influence over the Community budget, and can — by amending or rejecting a proposal — require the Council to act by unanimity where only a qualified majority would otherwise be required (cf. paragraphs 12.2 and 36.1 to 36.3).

The Decentralist Project: Summary Comments

67. Critique of the three variants of decentralism; pertinence of the EC model

The decentralist project, as reviewed in paragraphs 50 to 66, has three variants. All three call for extension of provincial powers over the economy.

- The first variant envisions action by each of the provinces to adapt and adjust their economies to continentalist market forces. It presupposes that they will have some latitude, however slight, to do so. *However, in practice, the effect of their efforts would merely be to facilitate and extend American control over a fragmented Canadian economy. Some will regard this as*

inevitable anyway. But to endorse it, as prescription, is defeatist. The EC model is irrelevant to this variant of the decentralist project.

- The second variant calls for economic liberalism, coupled with non-discrimination agreements among provinces. Its proponents appear to believe that such agreements would be adequate to preserve or even strengthen the present economic union. *Their arguments may rely on their reading of EC experience, but if the EC is their model, they have misunderstood it.*
- The third variant counterbalances the extension of the provinces' formal economic powers by calling for increased interprovincial policy coordination. *In practice, the provinces would limit and constrain each others' economic policy initiatives; thus, individually, they would gain little control over the development of their respective economies. Indeed, the extent of their control might actually diminish. Only this third variant, which is confederalist or tends towards confederalism, would draw in a significant way on the European Community as a political model for Canada.*

Responding to the Decentralist Project: A Reform Agenda for Canada

68. Demands for decentralization in Quebec

Many Quebecers propose far-reaching decentralization of the federal system, and see sovereignty as the only viable alternative. (For some, of course, sovereignty is the first preference; but others pin their hopes on reform of the federal system.) In any case — whether under federalism or accompanying sovereignty — an overwhelming majority of Quebecers want to keep the economic union intact.

69. and in other provinces

To a lesser extent — the situation is not entirely clear — some of the other provinces also want to gain new powers, including powers over the economy. The position is sometimes taken that, if Quebec wins added powers, other provinces should get them too. But again, everyone insists that the economic union should not be sacrificed.

70. A counter-thrust: strengthening the federal government

Meanwhile, decentralist demands are encountering new opposition. It is now proposed in some quarters that there should be a rebalancing of regional forces within central institutions, and that the powers of a rehabilitated federal government should be strengthened vis-à-vis the provinces. These proposals apparently assume that, while adjustments would be made to the division of powers, the competitive and frequently conflictual nature of federalism in Canada (cf. paragraph 73) would remain unchanged. In other words, the features of the federal system that are *least* acceptable to Quebec would be retained and even sharpened. Quebec would be welcome to stay — but not on terms that, by present indications, would be even remotely acceptable to it.

71. Shortcomings of the "division of powers" approach:

It follows that any approach to constitutional reform which focuses solely or even primarily on the division of powers stands merely to exacerbate the problems and tensions that seem to be endemic to the existing system.

71.1 (a) assuming decentralization

- Wholesale transfer of powers from the federal government to the provinces would reduce governmental effectiveness and raise, not lower, political tensions. In the EC, member states have come to recognize that they must accept limitations on their sovereignty; this has become imperative not only in terms of a common European interest, but in the interest of each state individually. National states have been induced to give up powers that Canadian provinces hold on to tenaciously, and aim to expand. However, if Quebec and certain other provinces were to succeed in achieving across-the-board decentralization (especially if both legislative powers and of fiscal resources are involved), the result would be to fragment the economy, increase regional and other economic disparities, and impair the capacity of government to defend and promote Canadian interests internationally, in particular vis-à-vis the United States.

71.2 (b) assuming a trading of powers, or

- A "trading" of powers — say, increasing the provinces' role in social affairs while strengthening the federal role in the economy — is superficially more attractive. However, the prospect of bringing about a wholesale re-negotiation of the division of powers is slight. Too many vested interests are involved. Disagreement on the desired direction of change — centralizing or decentralizing — is rife. The trading of powers would do nothing to enable Quebec or any other province to gain greater control over its economic development. Finally, devolution of fiscally burdensome responsibilities (involving, for example, full fiscal responsibility for income support or important public services such as health care) would be impossible, except if accompanied by fiscal decentralization. Such a development would increase regional disparities unless the equalization program were enriched — probably impossible for a fiscally and politically weakened federal government.

71.3 (c) assuming asymmetry

- Asymmetrical solutions are no panacea. If asymmetry were accomplished by giving some provinces augmented powers — and fiscal resources to match — while denying the same powers and fiscal resources to other provinces, it would be regarded by the latter group as intolerable. If accomplished by instituting a general rule of concurrency with provincial paramountcy, the result could be as disruptive as across-the-board decentralization — either asymmetry would do little to change the present situation, or (if extensive) it would: (i) entail serious fiscal complications, raising questions of equity, and (ii) probably disrupt the working of central institutions: voting in Parliament; jurisdiction and composition of the Supreme Court. Fi-

nally, any asymmetry impairing the operation of the economic union would be regarded as inherently unfair — as clearly it would be in the EC: that is why opting out is unknown there — and would surely be unacceptable to other provinces.

72. Why institutional reform holds promise

The conclusion is clear: attempts to completely recast the division of powers are likely to lead down a blind alley. On the other hand, appropriate institutional reform holds promise for resolving problems inherent in the present system, and reducing the current level of discontent. Significant redesign of the institutions of Canadian federalism could bring about a new political relationship between orders of government, and fundamentally alter the roles and responsibilities of each. This will be obvious, if one compares the Canadian federal system with the political arrangements that have been developed in the European Community.

73. Characteristics of the 1867 federal system

The federal system established in Canada in 1867 envisioned two orders of government that would, for the most part, act independently of each other. Each would have its own responsibilities, fulfilled through the exercise of mainly exclusive powers. (The two exceptions were agriculture and immigration, both of which were concurrent powers; and both orders of government were empowered to levy direct taxes.) Today it is widely recognized that, in practice, federal and provincial powers overlap, producing *de facto* concurrency across a wide range of policy areas. Nonetheless, the concept of separate spheres of action is still widely accepted as an ideal. While, obviously, the activities of the two orders of government impinge continually upon each other, the idea of "disentanglement" retains its attraction. For example, proposals for a reshuffling of powers, whether on the basis of symmetry or asymmetry, seem generally to reflect traditional notions of how the federal system should work. The approach typically taken is to identify what policy areas should be a federal responsibility, and what other policy areas should be provincial responsibilities, and then to propose adjustments to the division of powers that would enable each order of government to fulfil its separate responsibilities independently of the other.

74. The EC: co-responsibility

The European Community operates on a completely different basis. The notion of *co-responsibility* between the national states and Community institutions (although the term itself is not used) permeates the formal structures and the working practices of the Community. Co-responsibility is implied by the issuing of Community directives which it is the responsibility of national governments to transpose into national law. The administrative application of Community regulations and decisions by member states is a further expression of the principle of co-responsibility.

75. Elements of co-responsibility in Canada

In Canada the idea of co-responsibility is far from unknown; it is the basis, for example, of federal-provincial agreements regarding regional

development, and more generally it is implied in all cost-sharing practices, which permeate the system. Co-responsibility also underlies the criminal justice system, where the law itself is enacted by Parliament, but administration is provincial. However, the relationship that has been established between the federal government and the provinces when their powers and responsibilities overlap has frequently been a rocky one, and has given rise to widespread provincial complaints about federal unilateralism and general high-handedness. The fiscal consequences of cost-sharing, as it has affected provincial solvency and budgetary management — particularly at times of federal retrenchment, as recently — have been a source of sharp discord. In fact, these fiscal problems and disputes have been at the root of much of the present desire, expressed most strongly by Quebec, to move back to the original conception of Canadian federalism under which the two orders of government would be (in the words of a leading British scholar) "coordinate and independent" of each other.

76. The need for federal-provincial collaboration

The idea of a federal state in which the two main orders of government act in separate spheres may be tidy, and its application might be convenient, but it is a notion that is scarcely applicable in the modern world. The role of government is too pervasive to make the "coordinate and independent" concept a relevant one. Even a rolled-back state would far surpass what was envisioned when Canada and the other "older federations" — the United States, Switzerland, and Australia — were founded. In fact, fulfilment of the purposes of economic and political union in Canada requires collaborative action engaging both the federal government and the provinces. "Negative integration" cannot be achieved by the provinces acting alone (cf. paragraphs 57 to 59), and federal powers are inadequate to achieve "positive integration" without the involvement and support of provincial governments. *Coordinate and co-responsible orders of government, not coordinate and independent ones, are called for.*

An Institutional Reform Agenda

77. Possible redesign of the federal system

The thrust of the analysis in this paper is that to the extent concessions are made to Quebec's demands for broader constitutional powers, it would be reasonable and fair — and in keeping with Quebecers' expressed objectives — to insist that certain new steps be taken to strengthen the economic union. These "new steps" could involve, in part, certain changes to the division of powers, but the greater emphasis would appropriately be placed on redesign of the federal system itself. This idea presumes public debate and intergovernmental negotiations leading to constitutional amendments, perhaps of considerable scope.

78. Elements of an institutional reform agenda

To some extent, the items to be placed on an institutional reform agenda are ready to hand, in the demands that have been put forward by the Reform Party, by the Government of Quebec, by aboriginal peoples,

and by other groups. However, the recent experience of the EC, and current discussions with a view to the "1992" program and EMU, are also highly suggestive.

79. Federal decisions complemented by provincial action (subsidiarity)

The first theme of an institutional reform agenda is *keeping government close to the people*, or *simplicity and local control* — that is, in European terminology, *subsidiarity*. Obviously one approach is to revise the division of powers, decentralizing wherever possible. However, the limitations of this approach have been extensively reviewed. Other approaches, suggested by the EC model, are to limit central decision-making to the enunciation of principles or objectives, keeping detailed regulations to a minimum. Where concurrency is permitted — and perhaps its application can be greatly extended — federal decisions can be extended and applied, complemented and elaborated, by provincial action. Provincial administration of federal laws, especially where there is room for the exercise of administrative discretion, is also a possibility.

80. Co-decision

A second theme is *co-decision*. At earlier stages in our history, particularly in the late 1970s, there was much discussion of how provinces could be involved in, or even obtain control over, federal decisions that affected them in various ways; for example, by imposing costs on provincial governments through the exercise of the spending power. This remains an important subject, but co-decision has another aspect as well: taking and implementing decisions applying to the whole of Canada — not necessarily or exclusively *federal* decisions — in areas where provinces have at least partial jurisdiction. The negotiation of the FTA is an example of at least limited success in this endeavour, although in the end the agreement shied away from most of the subjects that would have impinged seriously on the exercise of provincial powers. Mechanisms for provincial involvement in making decisions applying to the whole of Canada deserve to be more fully explored, on the understanding that such decisions, once made, will be binding on the provinces, as well as being effective within areas of federal jurisdiction. In other words, where the responsibilities of government cannot, in the nature of things, be neatly or cleanly divided into separate federal and provincial parcels, and a joint policy is the only effective one, mechanisms enabling governments to work together are evidently needed. Co-responsibility necessarily entails co-decision.

81. Building a Canadian consensus

Closely related to co-decision in areas of overlapping concern and jurisdiction, is the *building of a Canada-wide consensus* on objectives that are of as great importance to the provinces as to the federal government, for example in fiscal policy and other aspects of macro-economic management. In some cases, the building of consensus will involve provincial or regional involvement in federal institutions, such as (perhaps)

the Bank of Canada; in others, interprovincial coordination could be of the essence. The mechanisms for achieving and giving effect to interprovincial coordination deserve close attention.

82. Neutral application of joint decisions

Another aspect of the institutional reform agenda concerns the neutral application of jointly-made decisions that affect provincial finances or administrative responsibilities, especially where the relevant decisions lie within, or affect, areas of exclusive provincial jurisdiction. For example, if consensus has been built on the achievement of Canada-wide standards or objectives in certain policy areas, is it appropriate that the federal government should be the body to decide whether the provinces are living up to their commitments? Ought a more neutral implementing body to take responsibility, adjudicating disputes (which could be as much interprovincial as federal-provincial)? And, closely related to this, is appeal to the Supreme Court appropriate or necessary in all areas of provincial jurisdiction? (For EC practice, refer back to paragraphs 13 and 65.5.)

83. An institutional reform agenda: conclusion

The subjects outlined above (paragraphs 78 to 82) do not necessarily comprise the whole of an institutional reform agenda, but they are more than merely illustrative: they form a large part of such an agenda. At every turn, the relevance — even the inspiration — of the EC model is obvious.

End Notes

[1] Section 100a of the EEC Treaty, as amended.

[2] Article 100 of the EEC Treaty.

[3] Article 119 of the EEC Treaty.

[4] Article 100b, EEC Treaty.

[5] P.J.G. Kapteyn and P. Verloren Van Themaat: *Introduction to the Law of the European Communities*, Second Edition, edited by Laurence W. Gormley (Deventer [The Netherlands] and Boston: Kluwer Law and Taxation Publishers, 1989), 117.

[6] *Avis . . . concernant l'union politique*, 11-13.

[7] Resolution of the European Parliament, 21 November 1990.

[8] The implications of this treaty provision are broad. According to a leading textbook on Community law, "In practice . . . the position of the Commission during the decision-making process of the Council is that of the thirteenth party in the negotiations leading to a decision of the Council: a thirteenth party fulfilling the important role of a mediator between the twelve national standpoints and also putting forward its own views, prompted by the Community interest, on the decision to be taken. If qualified majority decisions are possible, this mediating function may develop into that of an arbitrator, whose voice may be decisive." The authors also note that because the Commission may prevent the Council from acting, simply by withdrawing its proposal: "In some cases, when it has been apparent that the Council intended to adopt an emasculated version of a Commission proposal (necessarily, by unanimity), the Commission has even withdrawn the proposal rather than accept its emasculation." Kapteyn and Van Themaat, 253-4; 126.

[9] Kapteyn and Van Themaat, 238.

[10] *Avis . . . concernant l'union politique*, 14.

[11] President Mitterand used the phrase in an address to the European Parliament, in which he proposed the Community move forward to a new stage of integration, involving (if need be) only some of its members. This was a response to Britain's evident reluctance to join this process — which, however, it was eventually induced to do. Within two years, it and other member states had ratified the Single European Act.

[12] Cf. the quotation by Kapteyn and Van Themaat in note 8, above.

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